Supreme Court, U.S.
FILED

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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STEVEN DANIEL CARMAN and PATRICIA CARMAN,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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113 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

ON DIRECT QUESTIONING DURING VOIR DIRE, MAY A JUROR DELIBERATELY MISREPRESENT, CONCEAL OR LIE ABOUT HIS KNOWLEDGE OF AND ACQUAINTANCE WITH A WITNESS FOR THE STATE WITHOUT THEREBY DEPRIVING A CRIMINAL DEFENDANT OF THE FAIR AND IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT?

PARTIES TO THE PROCEEDINGS

STEVEN DANIEL CARMAN

PATRICIA CARMAN

THE STATE OF TEXAS

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To the Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Petitioners, Steven Daniel Carman and Patricia Carman, file this their Petition for Writ of Certiorari to review the judgment of the Court of Criminal Appeals of Texas which refused to grant Discretionary Review of the judgments of the Amarillo Court of Appeals affirming the convictions of Petitioners in the 364th Judicial District Court of Lubbock, Texas.

OPINIONS BELOW

Copies of the orders of the Texas Court of Criminal Appeals refusing Petitioners' Petitions for Discretionary Review are attached hereto as Appendix A and B. The letters from the Clerk of the Amarillo Court of Appeals, denying Petitioners' Motions for Rehearing, are attached hereto as Appendix C and D. The Opinions of the Amarillo Court of Appeals are attached hereto as Appendix E and F. The judgments of the 364th District Court of Lubbock County, Texas are attached hereto as Appendix G and H.

JURISDICTION

This is a criminal appeal from the highest court of a state. Petitioners' Petitions for Discretionary Review were refused by the Texas Court of Criminal Appeals on November 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1).

STATUTES INVOLVED

This appeal involves the Sixth Amendment and Fourteenth Amendment to the United States Constitution.

SUMMARY OF THE CASE

Petitioners were indicted for starving Stephanie Carman, Steven Carman's daughter and Patricia Carman's step-daughter, to death. Their separate cases were tried together to a jury in Lubbock, Texas.

The venire were given a questionnaire to answer and were questioned individually about whether they knew anyone on the State's witness list. A venireman, Robert York, denied knowing anyone on the list. Although they had apprehensions about him, Petitioners were unable to strike Robert York for cause and did not know enough about him to use a peremptory challenge on him.

During the trial, the State's first witness was Lloyd Cody. After he testified, Robert York called the trial judge to tell the judge that he did know Lloyd Cody. The trial court held a second voir dire. During this second voir dire, Robert York again lied about his knowledge of Lloyd Cody, claiming that theirs was only a casual acquaintance.

After the Petitioners were convicted,[1] Petitioners' counsel received anonymous telephone calls advising them of the extent of the relationship between Robert York and Lloyd Cody. Petitioners filed a motion for new trial and at the hearing thereon, Petitioners learned for the first time that Robert York was related to Lloyd Cody by marriage, they had known each other all of their life, they attended family reunions and functions together, they had gone on vacation together as children and they are in the same Sunday school class and see each other every Sunday.

---

[1] Patricia Carman was sentenced to fifty years in the penitentiary. Steven Carman was sentenced to ten years in the penitentiary. Both are presently incarcerated, serving their sentences.

Robert York's lies prevented Petitioners from intelligently exercising their peremptory challenges/ challenges for cause and deprived Petitioners of the impartial jury they are guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, requiring a reversal of their convictions.

STATEMENT OF THE CASE

QUESTION 1

ON DIRECT QUESTIONING DURING VOIR DIRE, MAY A JUROR DELIBERATELY MISREPRESENT, CONCEAL OR LIE ABOUT HIS KNOWLEDGE OF AND ACQUAINTANCE WITH A WITNESS FOR THE STATE WITHOUT THEREBY DEPRIVING A CRIMINAL DEFENDANT OF THE FAIR AND IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT?

Petitioners assert that this case presents an issue of first impression for this Court: may a venireman in a criminal case misrepresent, lie about or conceal his knowledge of or acquaintance with the State's witnesses and thereby prevent a criminal defendant's intelligent exercise of challenges for cause or peremptory challenges, without thereby also depriving the criminal defendant of the fair and impartial jury guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution?

> The "'essential function of voir dire is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel.'"

United States v. Brown, 799 F.2d 134, 135 (4th Cir. 1986).

During the jury voir dire, in which venire members were questioned individually, the State asked juror Robert York whether he knew anyone on the (witness) list (R. 542). York responded: "I don't know anybody on this list." (R. 543)[2] This was York's first opportunity to apprise the court that he (York) did, in fact, know Lloyd Cody, one of the State's first witnesses at trial. Instead, York affirmatively denied knowing any witness.

Relying on York's representations, Defense counsel then questioned York regarding various matters. The record demonstrates Steve Carman's attorney's apprehension with York; at one point during voir dire, counsel mentioned to York that: "I kind of get the feeling that you would like to serve as a juror," to which York responded: "It would be fine with me if -- you know, if I have to serve, I'll serve... ." (R. 562)

At the close of voir dire, Petitioners renewed various challenges for cause against six prospective jurors, challenges that the trial court had earlier denied. (R. 2313) The trial court again denied these challenges. (R. 2314) Petitioners then informed the court that they had to use their allotted peremptory challenges to remove these six objectionable jurors and consequently asked for additional challenges to use specifically against York and other remaining objectionable jurors. (R. 2315) Counsel stated that: "Suffice it to say that we feel that the intelligent use of our peremptory challenges would have demanded that these jurors be removed, **especially juror York**, Randall, Smith and Gipson, who will

---

[2] Venire panel members were asked to complete a jury questionnaire, which included a list of anticipated witnesses at trial. (R. 6022) The trial court admitted the witness list at the hearing on Defendants' Motions for New Trial. (R. 6044)

-- as the jury is presently constituted, we will be forced to have on this jury panel." (R. 2316 - Emphasis added.) The court then denied the Defense request for additional peremptory strikes. (R. 2316) Patricia Carman then renewed her objection to the court's denial (of extra peremptory strikes) and alleged numerous federal and state constitutional and statutory violations. (R. 2320-21)[3]

During the State's case-in-chief, York telephoned the trial judge and mentioned that he (York) knew the first witness to testify for the State, Lloyd Cody. (R. 2533) The court called York to the stand and the Petitioners again questioned him. (R. 2533-41) During this second voir-dire, York again deceived the attorneys, albeit this time by a lie of omission.

The trial court, the State and both Defense counsel asked questions of York during his second voir dire. Again, York was deceitful during this second voir dire.

Q: And how do you know him [testifying witness]?

A: He goes to church where I do.

Q: How well do you know him?

A: I've known him, you know, for quite some time. I've gone to church out there for quite some time.

---

[3] To preserve error properly on this issue, Petitioners took those steps identified by the Court of Criminal Appeals in *Jernigan v. State*, 661 S.W.2d 936, 940 n. 6 (Tex. Crim. App. 1983), *cert. denied*, 464 U.S. 986.

Q: What kind of contact have you had with him, other than just going to church?

A: You know, just mostly casual contact. You know, if you have a -- Sometimes the church would have a get together and, you know, I would see him there. We've visited, you know, and--but nothing more than, you know, the weather or anything like that.

(R. 2536-37) What York failed to disclose was that his contacts with Cody went much further than he revealed. York did not mention the fact that he had known Cody his whole life, was related to Cody through marriage, and that they attended family reunions and functions together. (R. 6029-6031)

Only after the trial did Defense counsel learn of this information. (R. 6066-68) Counsel received anonymous telephone calls concerning juror York's actual relationship to the testifying witness. In addition, several of York's relatives were overheard talking about York's and Cody's relationship. (R. 6067-68) Consequently, Petitioners filed Motions for New Trials in order to delve yet again into the actual relationship between Robert York and Lloyd Cody. (R. 118) During the hearing on the motions, York admitted that he had known Cody "all my life" and that his wife was married to Cody's cousin. (R. 6029-30) He went on to admit that he and Cody attended family gatherings together (R. 6031) and that he was sure he'd seen Cody at family reunions. (R. 6033) York and Cody had gone on vacation together as children. (R. 6031) Both York and Cody are in the same Sunday school class and see each other every Sunday. (R. 6037-38)

York acknowledged that during his two previous voir dire sessions, he'd given a clear impression that he only knew this man casually from church. (R. 6046) But when reminded that he'd been asked earlier in the proceedings to explain his relationship to Lloyd Cody, and when asked why he was less than forthcoming at that time concerning his relation to Cody by marriage, York replied that "I didn't feel it important. There's probably a lot of people that are married to somebody that's related to me, and it doesn't matter." (R. 6036)

Witness Cody testified as the State's first witness. (R. 2416) Cody's testimony was riveting; he literally set the stage for the State's case. He told the jury that Stephanie Carman looked:

> [m]alnourished ... Her eyes were sunken back into her skull. You could count her ribs individually. She looked emaciated. It was my initial impression that this child either had a medical problem or had not been eating.

(R. 2421) Moments later, Cody testified that Stephanie's room "seemed to be barren....It seemed odd to me that it didn't appear to be the room of a child." (R. 2424, 2480) Thus the jury's first exposure to this case came through a witness who described finding a malnourished 7 year-old girl laying unconscious in a barren room, her airways full of vomit. Under the best of circumstances, this testimony would likely be difficult to rebut to any single juror's satisfaction, much less to the satisfaction of the one juror who enjoys an intentionally undisclosed, and life-long, relationship with the testifying witness. It would come as no surprise that Petitioners would consider exercising a peremptory challenge to remove a juror who is related to, and so well acquainted with, such a testifying witness. But

York denied Petitioners that option through his deceit and lies.

Both Petitioners raised the denial of an impartial jury under both the federal and state constitutions in their direct appeals in the state courts. The Amarillo Court of Appeals determined that the information that York withheld was not material and that, therefore, by implication, they were not denied an impartial jury. (Opinions, Appendices E and F, pages 11a, 79a) The Court of Criminal Appeals of Texas declined to review either Petition for Discretionary Review, whereby that Court might have addressed these Sixth Amendment issues.

If Robert York had truthfully answered the questions posed him about his knowledge of the witnesses for the State, counsel for both Petitioners would either have changed their use of a peremptory strike that they had already decided to use, they would have sought an additional peremptory strike to remove this juror or they would have proceeded further in their attempts to disqualify this venireman for cause. The venireman's false answers prevented Petitioners from exercising this right. During trial, the juror's incomplete, if not outright false, answers again prevented Petitioners from having him removed from the jury and substituting an alternate juror; thereby depriving Petitioners of the fair and impartial jury they were entitled to.

The Sixth Amendment, made binding on the States by the Fourteenth Amendment, guarantees Petitioners a fair and impartial jury in their criminal case. Voir dire is an important method of protecting a defendant's right to trial by an impartial jury. ***See McDonough Power Equipment, Inc. v. Greenwood,*** 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984). The Second Circuit has held that "the defense deserves a full and fair opportunity to expose bias or

prejudice on the part of veniremen." ***United States v. Barnes,*** 604 F.2d 121, 139 (2nd Cir. 1979) (quoting ***United States v. Robinson,*** 475 F.2d 376, 380-81 (D.C. Cir. 1973), *cert. denied,* 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). When the trial court conducts the voir dire and refuses to ask the venirepersons whether they are acquainted with the prospective witnesses, it commits reversible error. ***United States v. Baldwin***, 607 F.2d 1295 (9th Cir. 1979). Such abuse results in reversible error since the number of meaningful challenges is reduced and the "inhibition of the right to challenge for cause or peremptorily is in that instance deemed to be prejudicial" to the defendant. ***Baldwin***, 607 F.2d at 1298 (citing ***United States v. Dellinger***, 472 F.2d 340, 366-67 (7th Cir.), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1972). *See also,* ***United States v. Brown***, 799 F.2d 134 (4th Cir. 1986).

Determining whether any of the prospective jurors know the witnesses is important to the question of a juror's impartiality. ***United States v. Anderson***, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981); ***United States v. Jackson***, 508 F.2d 1001 (7th Cir. 1975). Petitioners attempted to expose the bias or prejudice of juror York through the jury questionnaire and their questioning of Robert York; however they were prevented from intelligently exercising their peremptory and challenges for cause because of Robert York's intentional nondisclosure.

> "[D]eliberate concealment or purposefully incorrect responses during voir dire suffice to show a prejudicial impairment of the right to the exercise of peremptory challenges."

McCoy v. Goldston, 652 F.2d 654, 658 (6th Cir. 1981).

REASONS FOR ALLOWANCE OF THE WRIT

1. The Sixth Amendment's guarantee of a fair and impartial jury in a criminal case prohibits a venireman/ juror from deliberately misleading defense counsel through false and/or incomplete and/or deceptive answers to questions propounded to the venireman / juror during voir dire, especially when those false or deceptive answers prevent the defendant's intelligent use of peremptory challenges or challenges for cause.

2. When a partial, biased, or prejudiced juror is selected without fault or lack of diligence on the part of defense counsel, who has acted in good faith upon the answers given to counsel on voir dire, a criminal Defendant's right to a fair and impartial jury under the Sixth Amendment is violated and the criminal Defendant is entitled to a new trial.

CONCLUSION

For all of the reasons stated herein, this Honorable Court should grant this Petition for Certiorari.

Respectfully submitted,

L.T. "BUTCH" BRADT
Attorney for Petitioners
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Houston, Texas 77092-4716
(713) 681-2696
Fax: (713) 688-8212

APPENDIX A

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
November 13, 1996
COA#: 07-94-00173-CR
RE: Case No. 1133-96
STYLE: CARMAN, STEVEN DANIEL

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

SAM OGAN
500 S TAYLOR SUITE 110
AMARILLO TX 79101

RECEIVED
NOV 19 1996

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
November 13, 1996
COA#: 07-94-00166-CR
RE: Case No. 1316-96
STYLE: CARMAN PATRICIA

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

DANIEL W. HURLEY
1703 AVE. K
LUBBOCK TX 79401

RECEIVED
11/18/96

APPENDIX C

SEAL

Court of Appeals

Seventh District of Texas
Potter County Courts Building
501 S. Fillmore, Suite 2-A
Amarillo, Texas 79101-2449

June 26, 1996

Charles L. Reynolds
Chief Justice
Carlton B. Dodson
Justice

John T. Boyd
Justice

Brian Quinn
Justice

Peggy Culp
Clerk
Mailing Address
P.O. Box 9540
79105-9540

(806) 342-2650

FAX: (806) 342-2675

Mr. Sam Ogan
Attorney at Law
500 S. Taylor, Suite 110
Amarillo, TX 79101

Mr. Rusty Ladd
Special Prosecutor
500 Broadway
Plainview TX 79072

Gentlemen:

In case, No. 07-94-0173-CR, styled STEVEN DANIEL CARMAN V. THE STATE OF TEXAS, from the 364th District Court of Lubbock County, the Court this day overruled Appellant's Motion for Rehearing, of which you will please take due notice.

Very truly yours,

/s/ _____
Peggy Clup, Clerk

/ph

xc. Honorable Bradley S. Underwood, Judge
Ms. Jean Anne Stratton, Clerk
Mr. Robert Huttash
State Prosecuting Attorney
Mr. Troy Bennett, Clerk
Court of Criminal Appeals

APPENDIX D

RECEIVED
8/1/96

CHARLES L. REYNOLDS
Chief Justice
CARLTON B. DODSON
Justice
JOHN T. BOYD
BRIAN QUINN
Justice

PEGGY CLUP
Clerk
Mailing Address
P.O. Box 9540
79105-9540
(806) 342-2650
FAX (806) 342-2675

COURT OF APPEALS
SEVENTH DISTRICT OF TEXAS
POTTER COUNTY COURTS BUILDING
501 S. Killmore, Suite 2-A
Amarillo, Texas 79101-2449

July 32, 1996

Mr. Daniel W. Hurley
Hurley & Sowder
1703 Avenue K
Lubbock TX 79401

Mr. Rusty Ladd
Special Prosecutor
500 Broadway
Plainview TX 79072

Gentlemen:

In the case, No. 07-94--166-CR, styled PATRICIA CARMAN V. THE STATE OF TEXAS, from the 364th

District Court of Lubbock County, the Court this day overruled Appellant's Motion for Rehearing, of which you will please take due notice.

Very truly yours,

/s/ Peggy Clup
Peggy Clup, Clerk

/ph

xc: Honorable Bradley S. Underwood, Judge
Ms. Jean Anne Stratton, Clerk
xc: (with opinion only):
Mr. Robert Huttash, State
Prosecuting Attorney
Mr. Troy Bennett, Clerk
Court of Criminal Appeals

COPY

APPENDIX E

NO. 07-94-0173-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL B
MAY 30, 1996

STEVEN DANIEL CARMAN, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE 364TH JUDICIAL DISTRICT COURT
OF LUBBOCK COUNTY;
NO. 92-415353;
HONORABLE BRADLEY S. UNDERWOOD, JUDGE

Before DODSON, BOYD and QUINN, JJ.

In seven points of asserted error, appellant Steven Daniel Carman challenges his conviction of recklessly, by omission, causing serious bodily injury to a child and the consequent jury-assessed punishment of 10 years confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant's prosecution arose out of the death of his seven-year old daughter, Stephanie Carman, on June 8, 1992, which the State alleged was the result of malnutrition. He and his wife, Patricia Carman, Stephanie's stepmother, were charged with four counts of injury to a

child by omission. *See* Tex. Penal Code Ann. § 2204.[4] The defendants were tried before a jury in a joint trial that lasted five weeks and involved extensive expert testimony on Stephanie's condition and the cause of her death. For reasons we later express, we affirm the judgment of the trial court.

In the first four of appellant's points, he argues the trial court erred in 1) overruling his motion for a new trial based on juror misconduct; 2) overruling his motion for an instructed verdict; 3) refusing his requested instruction on the lesser-included offense of injury to a child by negligence; and 4) improper admission of evidence of reputation at the punishment phase. In a supplemental brief, appellant presents three additional points of error in which he assigns error to the trial court's 1) refusal to include an instruction on the offense of endangering a child; 2) admission of unqualified expert witness testimony; and 3) refusal to include an instruction to the jury that it must acquit if it found appellant's omission was only criminally negligent.

Appellant's first point challenge is based upon alleged juror misconduct. The facts concerning this point involve juror Robert York and the State's witness Lloyd Cody. During jury voir dire the jury panel was asked to complete a questionnaire. One of the questions asked if the panel members knew any of the potential witnesses on a one-page list. Lloyd Cody was the eighteenth of 98 names. When questioned individually, York stated that he did not know anyone on the list. At the close of voir dire, appellant renewed several challenges for cause which were denied. After using peremptory challenges to remove several panel members, appellant sought additional peremptory challenges to remove, *inter alia*, York. This request was also denied.

---

[4] The statute has been amended since Stephanie's death; however, none of those amendments are material to this case.

After Lloyd Cody testified, York notified the trial court that he knew Cody. The trial court held a hearing on the matter in which York described his relationship with Cody as limited to "casual contact" at church activities. Based on York's answers at that hearing, the parties made no objection to his continued participation as a juror.

Appellant subsequently filed a motion for new trial urging juror misconduct. The trial court held a hearing on the motion during which appellant presented additional evidence of York's relationship with Cody. Cody testified that his wife was York's cousin.[5] Although some years earlier they had attended family gatherings together, their recent relationship was primarily through church activities. They had not visited each other's homes. Cody and York were first acquainted through church well before they became related. On one occasion when Cody was seventeen and York was about seven, their families had taken a vacation together.

Juror York testified at the hearing that he had not seen Lloyd Cody's name on the witness list when he completed the questionnaire. Although he remembered the vacation with Cody's family, York put his age at about four and said he did not remember Lloyd Cody being present. According to York, he and Cody had not attended a family gathering together for approximately ten years and their recent relationship had been limited to "casual" contact at church events. The trial court denied appellant's motion for new trial, a decision which forms the basis for appellant's first point.

---

[5] Robert York's grandmother was the sister of Lloyd Cody's father-in-law.

When a juror withholds material information during voir dire, the juror denies the parties an opportunity to intelligently exercise their challenges and obtain an impartial jury. *Jones v. State*, 596 S.W.2d 134, 136 (Tex.Crim.App. 1980). However, several decisions of the Court of Criminal Appeals hold that information is not "withheld" unless the juror is "ask[ed] questions calculated to bring out that information which might be said to indicate a juror's inability to be impartial and truthful." *Armstrong v. State*, 897 S.W.2d 361, 363-64 (Tex.Crim.App. 1995).

Initially, we disagree with the State's argument that defense counsel did not ask properly focused questions. The question on voir dire was simple and direct: "Do you know anyone on the one-page witness list?" When York became aware that he knew one of the witnesses and was questioned about that relationship, he was asked how well he knew Cody and about his contacts with Cody outside of church activities. York's response to each question described "casual contact" through the church. Whether intentional or not, York withheld information.

We must next determine whether the information withheld was material. In doing so we note the language in *Von January v. State*, 576 S.W.2d 43, 45 (Tex.Crim.App. 1978), that the significance of a juror's relationship with other participants in a trial is for defense counsel, and not the juror, to determine. In order to make that determination, counsel is entitled to know the facts concerning that relationship. In *Von January*, a murder case, it developed that the foreman of the jury had not revealed a close and long acquaintance with the victim's family. Even though the juror recognized the victim's grandfather when he entered the courtroom, the juror failed to respond to defense counsel's question whether any of the jurors knew members of the victim's family. The juror admitted he may have erred in

not answering the question, but rationalized his failure to answer by saying that although he knew and recognized the victim's family, he did not answer "because he did not have any close personal dealings with the family." *Id.* at 45. In was in view of those facts that the appellate court determined reversible error was shown. In doing so, the court emphasized that the juror's acquaintance was with the family of the victim and, additionally, that the juror served as foreman of the jury, "a position of influence."

In reaching its conclusion, the *Von January* court contrasted the facts before it with those before the court in *Babin v. State*, 149 Tex.Crim. 339, 194 S.W.2d 563 (1946). In *Babin*, which also involved the foreman of the trial jury, the juror also failed to disclose the degree of his relationship with the victim. Although he had said that "he only knew him when he saw him [the deceased]," he failed to mention that he and the deceased were neighbors in a very small town. *Id.* at 566. The appellate court concluded that the juror's answer on voir dire "was not so palpably misleading or intentionally deceptive as to require reversal." *Von January*, 576 S.W.2d at 45.

The facts before us are more nearly akin to those in *Babin* than those in *Von January*. Here, the juror's relationship was with a minor witness, virtually all of whose testimony was echoed by other witnesses.[6] Additionally, the variance between the nature of the juror's relationship revealed and what was not revealed was minimal. The trial court did not err in refusing to grant a new trial on this basis. Appellant's first point is overruled.

---

[6] The substance of Cody's testimony is given in the recitation of evidence contained in our discussion of appellant's second point.

In his second point, appellant challenges the legal sufficiency of the evidence. When reviewing the legal sufficiency of the evidence, we are to apply the standard articulated in *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and *Turro v. State*, 867 S.W.2d 43, 47 (Tex.Crim.App. 1993). Under this standard, evidence is legally sufficient to sustain a conviction if, when viewed in the light most favorable to the verdict, a rational factfinder could find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 433 U.S. at 319. This standard of review is applied whether the conviction is based on direct or circumstantial. *Alexander v. State*, 740 S.W.2d 749, 757 (Tex.Crim.App. 1987), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1869, 128 L.Ed.2d 490 (1994). It is under these standards that we review the evidence in this case.

The State presented the testimony of Wilma Manning, an employee of the Texas Department of Protective Services. She described a telephone call she received from Patricia Carman between 4:00 and 4:30 p.m. on June 8, 1992. According to Manning, Patricia repeatedly described medical and mental problems of Stephanie, including an eating disorder, compulsive behavior and Attention Deficit Disorder. Manning described Patricia's speech as loud and continuous, with little opportunity for Manning to talk. In response to Manning's suggestion to take Stephanie to a doctor, Patricia expressed concern about being accused of misconduct. The call ended when Manning heard a male voice yelling and Patricia saying, "Oh, my God, I have got to call 911," at which time Patricia hung up.

The State also presented the testimony of the paramedics who initially responded to Patricia's 911 call. Lloyd Cody, the first paramedic, described Stephanie as "malnourished" because her eyes were sunken and all of her ribs were clearly visible. His initial opinion was that she had

some serious medical problem or had not been eating. When he first saw her, Stephanie was not breathing and her heart was not beating. Cody described the room Stephanie was in as "barren" with just a few articles of furniture. When shown photographs of the room taken on June 10, 1992, he said the toys and some of the furniture shown in the photographs were not present on June 8 when he saw the room.

A second paramedic called by the State, Robert Mello, also described the room in which Stephanie was found as dark and barren with only a bed, a nightstand, some empty shelves and a chair. Mello's description of Stephanie was that she was "emaciated," "like one of the kids from like a concentration camp or something." Patricia told Mello that Stephanie had not been eating for two weeks. Mello described some of the medical procedures taken with Stephanie, including the administration of intravenous fluids (IV).

The State next called Jeanette Whalen, an officer with the Lubbock Police Department who responded to the Carmans' call for help. Whalen also testified that many of the items in the photographs taken two days later, such as the dolls and other toys, were not present on June 8. She averred that she remembered that the toys shown in front of a window in some of the photographs were not there on June 8 because she specifically remembered another officer walking to the window and opening the blinds to provide more light for the EMS (emergency medical services) personnel; however, she identified a dresser that Mello had testified was not present as being in the room on June 8.

When Whalen sought to obtain some medical history from her, Patricia told her that Stephanie suffered from Post-traumatic Stress Disorder as a result of mistreatment by her

natural mother. Patricia also related that she "had not been able to get Stephanie to eat at all" the previous week. Stephanie was taken to University Medical Center where she was soon pronounced dead. Because of the circumstances surrounding her death, an autopsy was requested by a Justice of the Peace.

Wayne Casey, another officer of the Lubbock Police Department and the principal investigator on the case, described his involvement beginning, with his attendance at Stephanie's autopsy on the evening of June 8, 1992. In addition to Casey, others present at the autopsy were Sergeant Bill Hubbard, Dr. David Hoblit (who performed the autopsy), his assistant, an ophthalmologist and Dr. Garcia, who had seen Stephanie as a patient on previous occasions. Casey described Stephanie as very thin with visible ribs and sunken eyes. Her skin was "very, very pale," she had abrasions and bruises on various parts of her body and very thin hair with some patches missing. It was his impression that she had a long term illness or had been abused.

Casey, Bill Hubbard and another officer went to the Carmans' home on June 10, 1992 to investigate her death. Granted permission to inspect the home, the officers noticed that both the door to Stephanie's room and the door to her closet had chain-type locks mounted very high on the doors, well out of a seven-year-old's reach. Hubbard took photographs of Stephanie's room. The Carmans told the officers that Stephanie had been very disturbed and difficult to handle. They explained that several stains on the carpet were due to the fact that Stephanie would urinate and defecate in her room. The Carmans also provided the officers with a written record of what Stephanie had eaten the previous week (from Monday, June 1 through Saturday, June 6) with two notations labeled only Sunday and "Today,

Mon." This information was written on an envelope postmarked in Hobbs, New Mexico on June 5, 1992.

Through Casey, the State introduced a chart that the family had on the wall of Stephanie's room that was used to record her height and weight. A notation on the chart showed that Stephanie weighed 57 1/2 pounds when she was seven year and nine months old. At the time of her autopsy approximately a month later, Stephanie weighed 43 1/2 pounds. Casey described the toys in Stephanie's room as brand new and said he found new, unopened toys in her closet along with new dresses that still had store tags on them.

Casey interviewed and took written statements from appellant and Patricia. The substance of appellant's statement provided as follows:

> When Stephanie was taken out of the school system and Pat began to teach her at home full time, it was after she got out of Canyon Lakes. Pat wanted her taken out because they were giving her some kind of drug and they told Pat to contact C.P.S. [Children's Protective Services] because they couldn't give us any information and that we did't have anything to do with it. When Pat taught her at home, she would hold Stephanie's meals off until Stephanie finished her work. She never held it for a whole day that I know of. The past few weeks she was eating when I was there except for what Pat would tell me. I did have concerns. I was worried why Stephanie wasn't able to pick up weight. I thought maybe she was kept in the house too much. The last couple of weeks it seemed that her skin color got lighter. Pat told me that she was having problems getting her to eat. Pat told me that Steph was staying awake alot [sic] again.

There were so many times that Pat would use a method I would question but it seemed that it would bring Stephanie around and she wouldn't have her fits. I told her to do what she thought was right. Some of them were standing her in the corner for an hour, using the food and having Steph do her work over, over and over.

> I mentioned to Pat in the past two weeks that I was concerned about Stephanie's weight but she told me that she thought Stephanie was OK. Stephanie was awful melodramatic. In the last couple of weeks, Pat thought she was faking. I remember Pat saying that she was concerned about taking Stephanie to the doctor because she thought Social Services would get involved. I told her to call them. This was Friday or Saturday before she dies. I questioned her on things she was doing and she would tell me the doctor said this and we had to be consistent.
>
> I think it was Tuesday of last week that Pat told me she was force feeding Stephanie because she didn't want Social Services becoming involved. If I had it to do over again I think I would force Pat to give up on her.

Wayne Casey did not record any part of appellant's oral statement and disagreed with the idea that a tape recording "would be a good way to check and make sure everything is accurate."

Casey also interviewed Loretta Carman, the couple's other daughter, while she was staying with family friends in New Mexico. Before the interview, the attorneys representing appellant and Patricia requested to listen to the interview by telephone, to have the interview recorded, or to

allow JoAnn Jackson, the family friend with whom Loretta was staying, to be present. Casey refused all three requests. He described Loretta's responses during the interview as "coached." He said that she was flippant and used words that were not typical for her age but were used by her parents.

Casey also disagreed with the view, even if it came from Dr. Hoblit, that any of the bruises on Stephanie's body were natural rather than the result of abuse. On cross-examination, Casey went so far as to say that it was possible for him to determine whether a child has been abused based on what is present in or absent from the child's room.

Stephanie's natural mother, Myrtis Carman, described Stephanie's early childhood. The State introduced several photographs of Stephanie which Myrtis identified. She characterized Stephanie as "chubby" in several of the photographs. She denied ever giving Stephanie alcohol in her bottle so she would sleep. According to Myrtis, appellant talked her into allowing Loretta and Stephanie to stay with him to attend school for one year. At the end of the year she reluctantly permitted appellant and Patricia to keep the girls.

The State called Tammy Fowler, a special education teacher at Parsons Elementary where Stephanie attended school. Fowler taught a class designated as a "social adjustment" class for students diagnosed as emotionally disturbed. Fowler described Stephanie as a very sweet girl who loved attention. She felt that most of Stephanie's misconduct was an effort to get more attention from her. She said that Stephanie never had a problem with wetting her pants at school. Fowler said Patricia was involved in Stephanie's education and would communicate with her on a regular basis. She only recalled seeing appellant on two

occasions while Stephanie was in her class; however, she was not aware of what hours appellant worked and admitted that it was not unusual to see a student's mother more than their father.

Fowler described using food as part of a program of "rewards and consequences." This involved occasionally giving students treats such as candy for good work and making them complete projects before having lunch. While she was in Fowler's class, Stephanie usually brought her lunch to school. Fowler said that sometimes Stephanie's lunch was just a sandwich and that Patricia sent a note that Stephanie was not to have anything else. Stephanie was only in Fowler's class from August 1992 to February 1993 because the Carmans took her out of school to teach her at home.

The State next called Christy Barbec, a friend of Stephanie's older sister Loretta. Brabec described the two times she visited the Carmans' home. One occasion was to go swimming in the Carmans swimming pool and another was to attend a birthday party for Loretta. On the first occasion, Brabec was only in the house a few minutes. On the second occasion, she and other guests at the birthday party stayed overnight. Brabec said that she did not see Stephanie on either occasion but did see a door that was closed while she was there. She conceded that Stephanie could have been visiting one of her friends at the time.

Shelly Carman, Stephanie's cousin, related her experiences when visiting Stephanie's home. According to Shelly, Stephanie did not play with the other children and was not allowed to eat with the family. She remembered Patricia would fix a small plate for Stephanie after the others had eaten. Shelly also said that Stephanie did not participate with the rest of the family in opening presents at Christmas.

Shelly described playing with Stephanie in her room the Christmas before her death. According to Shelly, almost all the toys and furniture shown in the photographs taken June 10, 1992 were present the previous Christmas.

Harold Marlowe, a pharmacist at a pharmacy near the Carmans' home in June 1992, testified that Patricia came to his store on June 3, 1992 and asked what to give her child who had not eaten in four days. Marlowe recommended Ensure, which appellant purchased. Apparently seeking to cast doubt on his memory concerning the date of the purchase, the defense produced a receipt dated June 8 that showed the purchase of a case of Ensure from Marlowe's store. The receipt was signed by Patricia's mother, Phyllis Reynolds.

The State next called Dominga Bates. Bates visited her mother, the Carmans' neighbor, on a daily basis. She said she had seen appellant and Patricia with their older daughter Loretta on many occasions, but she had never seen Stephanie with them.

The State also called Barbara Pence as an expert witness. Dr. Pence held a Ph.D. and was an associate professor of pathology in Lubbock. She studies and teaches nutrition. Dr. Pence began by explaining charts used by doctors to plot the growth of children. She described that in their early years, children typically grow at a predictable rate and maintain an approximately constant position relative to their peers. A child whose size and weight put her in the 50th percentile at one year old would normally be expected to be very near the 50th percentile at six years old. According to Dr. Pence, a significant change in the percentile ranking of a child would indicate a problem of some type.

The State produced a chart showing that Stephanie's weight at the time of her autopsy was below the 5th percentile based on her height. Dr. Pence also reviewed medical records of Stephanie's growth from 10 months through 31 months of age. During that time the records indicated Stephanie was between the 80th and 95th percentile of weight for her height and that growth was normal.

Dr. Pence next discussed the process of malnutrition. She described two types of malnutrition which may both exist in varying degrees. The first, Marasmus, is a decrease in the total number of calories needed. The second, Kwashiorkor, is a severe protein deficiency. She described the symptoms of Marasmus as a "wasted" appearance where bones are clearly visible. This is a result of the body breaking down fat, and eventually muscle, for energy. Symptoms of Kwashiorkor include altered pigmentation of a person's hair, a buildup of fat in the liver, and anemia.

Dr. Pence examined the autopsy records and photographs and was questioned concerning her opinion whether Stephanie suffered from malnutrition. Dr. Pence opined that Stephanie was "very poorly nourished" based on her physical appearance, including visible bones, bruises and loss of hair; however, Stephanie's physical appearance was also consistent with other conditions, such as cancer. By using other information from the autopsy such as anemia, low blood protein levels and fat changes in the liver, she concluded that Stephanie was suffering from a combination of Marasmus and Kwashiorkor and that it was the result of at least six months of malnutrition.

Dr. Pence described a syndrome called Psychosocial Deprivation Dwarfism where parents describe their children as eating excessively. Parents will restrict the child's diet to the point where the child becomes malnourished. The child

will exhibit behavioral problems as a result of inadequate nutrition often leading to further restrictions of food.

Over appellant's objection, Dr. Pence testified that a sudden increase in food intake could cause a severely malnourished person to experience heart failure. This is the result of a weakened heart being unable to supply the blood needed by the stomach and intestines. The autopsy indicated that Stephanie had a significant amount of food in her stomach when she died. In her review of the blood analysis from the autopsy report, Dr. Pence noted several unusual values including a low red blood cell count and blood proteins, albumin in particular. Stephanie also exhibited a high value for creatinine which indicated to Dr. Pence the breakdown and use of muscle tissue for energy.

Dr. Pence felt that a person with the low amount of albumin present in Stephanie's blood would have been very lethargic and probably unable to walk in the hours before the blood sample was taken. She also agreed that it is possible in some circumstances that a child could lose well over half their body weight and survive. She distinguished those cases from Stephanie's condition citing the low blood protein levels and anemia.

In cross-examining Dr. Pence, the defense cited an article she relied on about Psychosocial Deprivation Dwarfism. In the article, the doctor discussed several tests and the background information required to diagnose the condition. While Dr. Pence conceded that the tests had not been performed, she also asserted that the tests could not be performed after death. She also rejected the defense contentions that the blood tests were distorted by the IV solution.

Dr. David Hoblit performed the autopsy on Stephanie. His testimony began with a description of his background and training. Dr. Hoblit recounted that his residency included work in forensic pathology and that he worked as an associate medical examiner in Corpus Christi. He taught pathology at the University of California in the early 1970s and had an article published in 1974. Although Dr. Hoblit was board certified in clinical pathology but not forensic pathology, he estimated that he had performed some 800 autopsies, 400 of which were forensic autopsies. He described his familiarity with research on deaths related to malnutrition, which were typically the result of improper efforts of weight reduction. He also stated that participated in the autopsies of two women who died from misusing diet pills. Dr. Hoblit helped design the laboratory monitoring portion of a weight reduction program operated in California.

Dr. Hoblit described the steps he took in conducting the autopsy of Stephanie Carman. He began by obtaining the records made in the emergency room. Before conducting the autopsy, Dr. Hoblit contacted Dr. Garcia (a pediatrician and director of a child abuse center), an ophthalmologist, and a photographer. He also requested x-rays of Stephanie's entire body. When Dr. Hoblit weighed her on a scale provided by the University Medial Center, he found that Stephanie weighted 43.8 pounds.[7] According to measurements made about 18 months prior to her death, Stephanie's weight put her between the 50th and 75th percentiles. Based on

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[7] In response to defense challenges to the accuracy of the scale, the State called the Nursing Supervisor at University Medical Center, Nancy Smith. She provided the scale that Dr. Hoblit used to weigh Stephanie before the autopsy. Smith described how the scale is stored and calibrated before use. She was also present when Dr. Hobbit weighed Stephanie twice. She calibrated the scale between the first and second weighings and remembered that the scale indicated the same weight both times.

continued growth at a normal rate, Hoblit estimated that Stephanie should have weighed between 58 and 66 pounds.

In conducting the autopsy, he found that Stephanie had only 0.5 centimeters of subcutaneous fat. The doctor had never seen a person with a measurement of less than 1.2 centimeters. He also found Stephanie had suffered 25 to 35 percent hair loss. According to the medical literature upon which Dr. Hoblit relied, hair loss begins four to six weeks after significant nutritional deprivation. Stephanie's hair also exhibited hypopigmentation (loss of pigment) which results from periods of severe protein deprivation.

In examining x-rays of Stephanie, Dr. Hoblit found "growth arrest" lines in the long bones. Malnutrition is one of the causes of "growth arrest." Dr. Hoblit described Stephanie's heart weight as 22 to 26 percent less than what it should have been. He stated flatly that that condition was life threatening and caused Stephanie's death. He also stated that her hemoglobin value of 4.5, less than half a normal value, could have independently caused her death. He opined that malnutrition can also cause a reduction in hemoglobin and that he found such a reduction in Stephanie's blood. Stephanie's serum protein was 2 grams when a normal value would be between 6 and 8 grams, which the doctor also attributed to malnutrition. According to Dr. Hoblit, Stephanie's blood of pH of 6.8 was significantly below the normal of 7.4 and was also a life threatening condition. In his opinion, the low pH value was attributable to the use of fat stores for energy. Tests revealed no drugs in Stephanie's body at the time of her death. He stated that the IV fluids given would not have altered these findings.

Dr. Hoblit described Stephanie as exhibiting all ten symptoms listed in medical texts for Kwashiorkor. He also described two types of malnutrition: primary, where there is

an inadequate diet, and secondary, where the malnutrition results from an inability to absorb or use nutrients. His examination of numerous internal organs convinced him that there was no possibility of secondary malnutrition. He described Stephanie's heart as "absolutely 100 percent diagnostic of [Kwashiorkor]". Examination of Stephanie's lungs did not show that aspiration of food particles was a cause of her death; however, he did find extensive loss of muscle in her diaphragm, which would have affected her ability to breath.

Dr. Hoblit also described his examination of Stephanie's stomach. He determined it was 40 to 50 percent full and specifically noted that it contained identifiable cubes of potatoes that showed no sign of having been chewed; however, it did not contain any pills. The stomach contents he examined were not consistent with the list of Stephanie's meals that appellant gave the police. In response to a hypothetical question from the State, Dr. Hoblit opined that even if aspiration of food was the actual cause of Stephanie's death, her other conditions were extremely life threatening.

On cross-examination, the defense initially explored the relationship between Dr. Hoblit and Lubbock County. Beginning in May 1992, Dr. Hoblit negotiated with Lubbock County to hire forensic pathologists to perform autopsies for the county. On July 16, 1992 the county entered a $200,000 per year contract with Dr. Hoblit's association. After having offers rejected by two candidates, he hired Dr. Jody Nielsen, who left Lubbock to work in Beaumont shortly after arriving in Lubbock. When asked why she left, Dr. Hoblit gave specific examples of problems. He recounted three incidents where Dr. Nielsen objected to his scheduling of autopsies she was to perform rather than allowing her to do so. Dr. Nielsen also objected to having law enforcement officers "looking over her shoulder" when performing autopsies. Dr.

Hoblit suggested that her friendship with Sergeant Bill Hubbard of the Lubbock Police Department caused additional tension when Hubbard became the target of an investigation by the Lubbock County District Attorney.

The defense re-examined the possible contamination of the tested blood samples by the IV solution. Dr. Hoblit stated that the amount of calcium in Stephanie's blood was high, contrary to what would be expected in a malnourished person; however, one of the IV solutions administrated to Stephanie contained calcium. Because he characterized non-congenital thyroid disease before adolescence as "almost nonexistent," Dr. Hoblit only examined the thyroid generally and did not dissect it or prepare slides from it. Finally, the doctor described malnourishment as a diagnosis of exclusion only to the degree that secondary malnutrition must be excluded to diagnose primary malnutrition.

The State's next witness was Dr. Ewell Clarke, a pediatric radiologist who teaches at the University of Texas at San Antonio. Dr. Clarke examined the x-rays taken of Stephanie after her death. He described two abnormal findings present in the x-rays. First, there was no detectable subcutaneous fat which is normally visible, although the muscles were within normal limits. Second, there were several growth arrest lines present in the bones of Stephanie's legs. These growth lines indicate some severe stress such as cancer, a surgery, deprivation of food, or inability to absorb food. In his opinion, the causal stress leading to that condition had occurred within the previous nine to twelve months.

Although he acknowledged on cross-examination that he had seen hyperthyroidism in a seven year old, Dr. Clarke was not asked whether those cases involved congenital conditions. He had never seen a case where growth arrest

lines were the result of emotional disturbance but was aware of such cases from medical literature. Dr. Clarke estimated that he would expect to find growth arrest lines in about 10 percent of children.

The State called Nina Stolzenberg, an intern in child psychology who saw Stephanie from August 1990 through July 1991. She described Stephanie at that time as thin, but not so thin as to cause concern. One of the tools Stolzenberg used when evaluating a new patient was to ask what they would wish for if they had three wishes. Stephanie wished for a fork, a knife and a spoon. She also did very poorly on some standardized tests. The Carmans had expressed concern to Stolzenberg that Stephanie had been given Everclear (a strong alcohol) and been undernourished when she was an infant, and that may have impaired her development. Stolzenberg described the Carmans' participation in her contact with the child as minimal, giving as an example their canceling or failing to show up for at least 20 percent of the appointments that were made. Her therapy ended at Patricia's request.

The State next called Dr. Robert Bux, a medical examiner from Bexar County who was certified in anatomical, clinical and forensic pathology. Dr. Bux examined the results of Stephanie's autopsy and gave his opinion as to her death. He began by noting several abnormalities in the blood tests, specifically high calcium, low sodium, and extremely low-protein, hematocrit and hemoglobin. Dr. Bux dismissed the calcium and sodium values on the basis that the samples could have been affected by the IV solution or an error in the operation of the testing equipment. Because other values such as the enzyme levels were normal, he felt the blood samples were "valid."

Dr. Bux also noted the absence of subcutaneous fat in the x-rays and photographs taken at the autopsy and the growth arrest lines in the x-rays. The condition of the food found in Stephanie's stomach indicated to him that she had eaten just before she died. Because of the lack of inflammation in the lungs, Dr. Bux believed that any aspiration of food occurred essentially at the time of her death and was probably a result rather than a cause of her death. He also noted the loss of muscle in her diaphragm and the fibrosis in her heart, both of which are consistent with malnutrition.

The autopsy information he reviewed did not show any form of cancer or any other medical problem that might have accounted for Stephanie's emaciated condition. The doctor's conclusion was that Stephanie suffered solely from starvation and malnutrition due to a lack of food. He felt this was true even though the autopsy showed several organs, including the spleen, thyroid, adrenal glands, and the endocrine system were normal.

In response to defense evidence suggesting the existence of other causes of Stephanie's condition, the State called Dr. Wilhelmina Tengco, a child psychiatrist who had treated Stephanie in 1990. Based on her examination and treatment of Stephanie, Dr. Tengco determined that she did not suffer from an eating disorder, hyperthyroidism, leukemia or inability to absorb nutrients. On cross-examination, she admitted that she did not perform laboratory tests for any of these conditions. Dr. Tengco disagreed with the proposition that emotional problems affected physical growth.

The defense began its case-in-chief by calling Tommy Debs Crawford, another paramedic who responded to the Carmans' 911 call. He was the first emergency medical

person at the scene and wrote the emergency medical service report on the event. When he first arrived, appellant was attempting to clear Stephanie's mouth so she could breathe. When Crawford began working on Stephanie she had no pulse and a "huge" amount of vomit in her mouth that had to be cleared away. With the assistance of other paramedics, Crawford was able to force oxygen into Stephanie's lungs using a tube; however, the low level of oxygen subsequently found in Stephanie's blood indicated that CPR was generally not effective.

Crawford's report described Stephanie as "unresponsive," meaning there was no reaction to any stimuli, including pain. It was his opinion that Stephanie had been in that condition of "a while" before they were called. When he questioned Patricia about Stephanie's doctor, she replied that Stephanie did not have one. Crawford also confirmed the other paramedics' description of the room as very bare, with only a bunk bed and a chest.

The defense presented the testimony of Irwin Okun, the Carmans' neighbor. Although he admitted having Alzheimer's disease, Okun remembered seeing Stephanie on two specific occasions and on those occasions she seemed normal. Loretta visited the Okuns on several occasions but Stephanie and her parents did not.

Cora Colleen Riley Carman, who goes by "Carla," is the wife of appellant's brother and has worked as a nurse's aid. She visited appellant's home at least once or twice a week, often accompanied by her children. Carla's family would often celebrate holidays at appellant's home and many of these visits included having meals together. On those occasions, Stephanie ate with the rest of the family. Directly contradicting the testimony of Shelly Carman, she denied that appellant and Patricia ever deprived Stephanie of food or

kept her locked in her room. According to her, the only time Stephanie was required to stay in her room was to finish schoolwork. Carla also stated that Shelly had never been at appellant's home without Carla and contradicted Shelly's description of Stephanie's exclusion from the Carmans' Christmas day activities.

Carla testified that she had been in Stephanie's room on many occasions, including the week before her death, and that the room was always as it appeared in the photographs taken shortly after Stephanie's death. Carla described Stephanie as having a short attention span, developing slowly, and more likely to have emotional outbursts than most children. As long as she had known Stephanie, she was "just a little, skinny, little kid" and had not suffered any noticeable weight loss. On the day Stephanie died, Carla left work at 3:15 p.m. and went to appellant's house. Upon greeting her at the door, Patricia told Carla that Stephanie would not eat and had not eaten all day. Although Stephanie would not talk to Carla, she did eat some pudding at Carla's request.

After eating, Stephanie went to the sink and got a glass of water in a manner which Carla described as skipping or hopping. After drinking the water, Stephanie returned to the table and "lowered herself down" to the floor and sat there.[8] Carla and Patricia discussed taking Stephanie to a doctor due to Stephanie's failure to eat. When Carla left the house at about 4:00 p.m., Stephanie was lying on the floor by her bedroom, but that did not strike Carla as unusual. Shortly after she arrived home, appellant called to tell her that Stephanie had been taken to the hospital. Carla, her son

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[8] Carla acknowledged that there was a slight discrepancy between her account and appellant's which described Stephanie slumping out of a chair onto the floor.

and her husband went to appellant's house and then to the hospital with him. She described appellant as being in a "state of numbness."

Daniel Carman, Carla and Michael Carman's son and Stephanie's cousin, spent the last six weeks of the 1991-1992 school year at appellant and Patricia's home, returning to his own home a week before Stephanie's death. During his stay, Daniel ate with the Carmans. He testified that Stephanie always ate with the family and that he played with Stephanie in both the front and back yards of the house. He did say Stephanie spent most of her time in her room. Daniel had been in Stephanie's room on many occasions and said that it always appeared as it did in the June 10 photographs. Daniel also contradicted Shelly's account of the previous Christmas, saying Stephanie was not excluded from the family's activities.

On the day Stephanie dies, Daniel was at the Carmans' house from early in the morning until his mother took him home at about 4:00 p.m. He saw Stephanie walking around the house earlier in the day and said she was acting normally.

Daniel's sisters, Sybil and Paulette, echoed must of his testimony. They had also visited the Carmans' house on many occasions, often spending the night. Both stated that Stephanie regularly ate with the rest of the family. They remembered Stephanie's room being as it appeared in the June 10 photographs. Sybil said the only time she was aware that Stephanie was required to stay in her room was when she was "in trouble" with her parents. The sisters last saw Stephanie a week before her death and did not perceive that anything was wrong with her.

The defense also called Stephanie's sister Loretta. She testified that she saw their natural mother put Everclear in Stephanie's bottle on many occasions. Loretta described the bottle and recalled reading the label. She also contradicted Shelly Carman's claim that Stephanie did not eat with the rest of the family. Loretta also disputed the State's evidence that Stephanie's room was barren.

A videotape introduced through Loretta showed Stephanie participating in Christmas activities in 1990 and 1991; however, the tape which purported to be the Christmas 1991 tape showed only members of the immediate family, and did not show Loretta and Stephanie's cousins, or Michael and Carla Carman as being present that day. In response to questions by the State, Loretta could not identify any photographs or videotapes made between Christmas 1991 and Stephanie's death the following June.

Loretta testified that on June 8, 1992, Stephanie looked and acted normally. She said that when appellant came home from work that day, he asked Loretta to make coffee for him, walked toward the master bedroom, and saw Stephanie lying on the floor of her room. Appellant ran back to the kitchen and told Patricia to call 911.

Describing her interview with Wayne Casey in New Mexico, Loretta denied that she had been told what to say and said Casey was the only person who pressured her to make particular statements.[9] She described previous occasions when Stephanie would refuse to eat for a few days.

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[9] In response, the State called Ann Garton, an employee of a New Mexico social service agency who was present during Loretta's interview with Detective Casey. She testified that Casey did not make any attempt to intimidate or pressure Loretta into giving particular answers to his questions.

She also told Casey that Stephanie would occasionally eat too much. Loretta knew that there was a lock on Stephanie's door that was used to keep her from getting up at night and eating "a lot." Loretta denied initialing the pages of her statement and suggested that Casey put them on the statement.

A family friend, JoAnn Jackson, testified that she and her family spent the Memorial Day weekend before Stephanie died with the Carmans. Jackson, who had raised nine children, described Stephanie's appearance as normal. The only difference in Stephanie's appearance that she observed between Memorial Day 1992 and the previous visit in April 1991 was an increase in Stephanie's height; however, as the State pointed out, Stephanie had grown less than an inch in that period. Jackson described Stephanie's room as it appeared after her death. She also stated that Stephanie ate with the family and occasionally ate large amounts.

The defense medical expert was Dr. Jody Nielsen, a forensic pathologist working in Beaumont. Dr. Nielsen examined the autopsy report and much of the evidence on which it was based. She was of the opinion that the small abrasions pointed out by the State's experts actually occurred after death. She also discounted Stephanie's loss of hair, opining the loss was consistent with Stephanie pulling her hair out and noting evidence of new hair growth. Dr. Nielsen was critical of Dr. Hoblit's failure to preserve the hair sample that illustrated the loss of pigmentation he said was indicative of malnourishment, suggesting instead that the photographs of Stephanie's hair merely showed reflections of light. Concerning the exclusion of secondary malnutrition through an inability to absorb nutrients, in Dr. Nielsen's opinion, the slides of Stephanie's intestine no longer showed the structures needed to make that determination. She made

a similar assertion with regard to excluding the existence of leukemia, contending that a bone marrow sample was necessary.

Dr. Nielsen disagreed that there was fatty metamorphosis in Stephanie's liver. She found that the fat layer around the heart was normal for a child and that the heart's weight was normal. She said these findings were inconsistent with malnutrition. She suggested that Dr. Hoblit "doesn't know what a child's heart look[s] like normally" and even suggested that he was "manipulating the studies to say what he wanted it to say." She challenged the electrolyte results obtained from the blood samples on the basis that blood is not an accurate indicator after death. She stated that testing the vitreous fluid was required. According to Dr. Nielsen, Stephanie's subcutaneous fat measurement of 0.5 centimeters was normal. In her opinion, none of the autopsy findings were pathonomic or diagnostic of malnutrition.

In Dr. Nielsen's opinion, hyperthyroidism could account for both increased activity level and metabolic rate resulting in weight loss. One of the hormones that would indicate hyperthyroidism, T4, could be tested after death but this test was not performed on Stephanie. No samples of the thymus, adrenal glands, or the pancreas were taken although each would show evidence of malnutrition. She also contended that because of Stephanie's psychiatric problems and eating disorder, the growth charts described by Dr. Pence did not apply to Stephanie. Suggesting that Stephanie's death could have been the result of another disease, Dr. Nielsen pointed to a blood culture that indicated the presence of beta strep group b, an infectious organism that "has caused death . . . even in normal healthy people."

On cross-examination, the State elicited the fact that Dr. Nielsen had never performed an autopsy where

malnutrition was determined to be the cause of death, nor had she received training in the field of nutrition. She also declined to estimate the number of autopsies she had performed on children. Dr. Nielsen revealed that she was not familiar with Stephanie's previous medical history but did not think it was significant in determining the cause of death. She also admitted she had not reviewed all of the autopsy results, and in particular, she had not examined the x-rays relied on Drs. Clarke and Bux.

The defense called appellant's mother, Lodina Kelly. She related that although he is large as an adult, appellant was very thin as a child. After Loretta and Stephanie went to live with appellant and Patricia, Lodina questioned Myrtis about putting Everclear in Stephanie's bottle. According to Lodina, Myrtis did not deny it.

In support of his legal insufficiency point, appellant argues the only conclusions that can be rationally drawn from the evidence are that Patricia had undertaken the primary role in caring for Stephanie and there is no evidence that he was "aware of but consciously disregard[ed] a substantial and unjustifiable risk"[10] that Patricia's care of Stephanie would cause serious bodily injury. That being so, he reasons, the evidence falls short of showing he was guilty of the reckless conduct proscribed by the statute but, at most, only shows he was negligent in not being aware of the risk caused by Patricia's conduct. In advancing that argument, appellant notes the definition in § 6.03(c) of the Texas Penal Code which defines conduct as reckless when a person "is aware of but consciously disregards a substantial and unjustifiable risk . . . ." Tex. Penal Code Ann. § 6.03(c) (Vernon 1994). There is a paucity of reported cases in which an individual

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[10] *See* Texas Penal Code § 6.03(c) defining the culpable mental state of "reckless."

was prosecuted for "recklessly by omission" causing serious bodily injury to a child.[11] The case most nearly analogous to this one is *Ahearn v. State*, 588 S.W. 327 (Tex.Crim.App. 1979). *Ahearn* involved injury to a child based on failure to provide adequate food and other needs; however, that prosecution was brought under a prior version of Penal Code § 22.04 that did not distinguish between acts and omissions. *Id.* at 336. Other cases which involve the failure to protect children from dangerous instrumentalities under the defendant's control are inapplicable. *See Mills v. State*, 742 S.W.2d 831 (Tex.App.--Dallas 1987, no pet.)(failure to keep 15 month old child out of scalding water); *Durkovitz v. State*, 771 S.W.2d 12 (Tex.App.--San Antonio 1989, no pet.) (leading unmuzzled 350-pound lion through flea market near children).

Appellant acknowledges the portions of his statement that show he was aware of at least a potential problem with Stephanie's health. These statements include his concerns that Stephanie was not gaining weight and was becoming increasingly pale. He urges that Patricia's response that she was following a doctor's instructions reduce his culpability for failing to act on his concerns from recklessness to negligence; however, this argument ignores those portions of his statement showing that he knew Stephanie had *not* been to a doctor recently. Our review of the evidence, in particular, Stephanie's emaciated physical condition, when combined with appellant's awareness of some problem with her health, convinces us that it is sufficient to permit a jury to rationally find that his disregard of that knowledge was reckless. Appellant's second point is overruled.

In his third point, appellant challenges the trial court's refusal to submit an instruction on the offense of injury to a

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[11] Tex. Penal Code Ann. § 22.04(a)(1) (Vernon 1994)

child through criminal negligence, which he argues is a lesser-included offense. Curiously, and without explanation, appellant urges the opposite position in the third point advanced in his supplemental brief, *i.e.*, that the trial court erred in failing to instruct the jury to acquit if it found appellant's failure to act was the result of criminal negligence.

It is well established that upon timely request a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. First, the lesser offense must be within the proof necessary to establish the offense charged. Second, the record must contain some evidence that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex.Crim.App. 1993), *cert. denied*, __U.S.__, 114 S.Ct. 313, 126 L.Ed.2d 260 (1993).

In support of the position that he was entitled to a charge on the offense of injury to a child through criminal negligence, appellant cites numerous cases in which Texas courts have recognized that injury to a child may be committed by criminal negligence; however, these cases are distinguishable because they do not discuss or consider the effect of the 1989 amendment to the statute in which the present distinction was drawn between the culpable mental states required to commit injury to a child by act (intentionally, knowingly, recklessly, or with criminal negligence) and those required to commit injury to a child by omission (intentionally, knowingly or recklessly) *See* Act of June 14, 1989, 71st Leg., R.S., ch. 357, § 1, 1989 Tex. Gen. Laws 1441. Because appellant was charged with committing an omission offense, and injury to a child by criminal negligence is not included within that portion of the statute, it is by definition not a lesser-included omission

offense. Consequently, the jury's failure to find that he acted intentionally, knowingly, or recklessly would have required appellant's acquittal. Appellant's third point is overruled.

We logically proceed to appellant's third supplemental point in which he reasons that the failure to instruct the jury to acquit if it found that his culpable mental state was only criminal negligence requires reversal. It is established law that na instruction that merely denies an element of the offense need not be given. *Moore v. State*, 736 S.W.2d 682 (Tex.Crim.App. 1987). Because the State was required to prove that appellant acted intentionally, knowingly, or recklessly, the requested instruction that criminal negligence was insufficient simply sought to negate an element of the offense.

Appellant cites *Troyer v. State*, 516 S.W.2d 163, 164 (Tex.Crim.App. 1974), for the proposition that the failure to give a defensive charge on the issue of culpability is reversible error; however, in *Troyer* the trial court failed to give *any* instruction on culpability in spite of a specific request for such an instruction. Here, the court's charge included instructions on intentionally, knowingly and recklessly, thus, *Troyer* is inapplicable. *See Manuel v. State*, 782 S.W.2d 335, 337 (Tex.App.--Houston [1st Dist.] 1989, pet ref'd). Appellant's third supplemental point is overruled.

In his fourth point, appellant assigns error to the admission of testimony concerning his reputation for being law abiding while living in Moriarity, New Mexico, approximately three years before Stephanie's death. In support of this point, appellant initially cites *Smith v. State* 162 Tex.Crim. 237, 283 S.W.2d 936, 938-39 (1955), defining general reputation as "what is generally said about him in the community in which he lives . . . ." Appellant

acknowledges but unsuccessfully seeks to distinguish *Arocha v. State*, 495 S.W.2d 957, 958 (Tex.Crim.App. 1973), holding "[a] person's community is not limited to the locale where the case is tried nor his residence at the date the offense was committed."

We initially note that *Smith* did not involve the presentation of a geographically or temporally remote reputation as does the present case. In *Arocha*, the defendant was being prosecuted in Austin for sale of marijuana. The State asked a witness if he had heard that Arocha was charged with possession of marijuana in Houston. The opinion does not state where the witness resided. Even though *Arocha* supports the trial court's action in this case, we are convinced that Article 37.07, § 3(a) of the Code of Criminal Procedure is dispositive of this point. That statute governs the type of evidence admissible at the punishment phase of trial. It provides:

> evidence may be offered by the State and the defendant as to any matter the court deems relevant to sentencing, including but not limited to . . . his general reputation, his character, [and] an opinion regarding his character.

Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a) (Vernon Supp. 1996).

Nothing in the foregoing statute limits evidence of a defendant's general reputation to a particular community. *See also Tompkins v. State*, 774 S.W.2d 195, 216-17 (Tex. Crim.App. 1987), *aff'd*, 490 U.S. 754, 109 S.Ct. 2180, 104 L.Ed.2d 834 (1989) (holding defendant's reputation in Virginia admissible in Texas prosecution). We also do not believe the three year period between appellant's residence in Moriarity and the trial is so great as to make the testimony inadmissible. Appellant's fourth point is overruled.

In his first supplemental point, appellant assigns error to the trial court's refusal to instruct the jury on the offense of endangering a child. As noted above, a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. First, the lesser offense must be within the proof necessary to establish the offense charged. Second, the record must contain some evidence that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Rousseau*, 855 S.W.2d at 672.

An examination of the elements of the Penal Code offenses of injury to a child (§22.04(a)) and endangering a child (§ 22.041(c)) suggests that endangering a child is a lesser-included offense of the second and third methods by which one may commit injury to a child (causing serious mental deficiency, impairment or injury or by causing bodily injury), but not of the first method (causing serious bodily injury). The most significant distinction between the two offenses is that endangering a child does not require an actual injury. Here, appellant was indicted for causing serious bodily injury and serious mental deficiency and impairment. Because the jury charge contained instructions on all three methods of committing injury to a child, under proper circumstances, endangering a child could be a lesser-included offense.

Having determined that endangering a child can be a lesser-included offense of injury to a child, we must next determine whether there was some evidence that would have permitted a jury to rationally find that, if appellant was guilty, he was guilty only of the lesser offense. In order to make such a finding, the jury would have to find that appellant failed to provide Stephanie with proper nutrition but neither her bodily injury nor her death were the result of that malnutrition.

The only evidence that Stephanie's injury or death might have been caused by something other than malnutrition came from Dr. Nielsen, who also testified that Stephanie was *not* suffering from malnutrition. Consequently, the jury would have to disbelieve the State's experts that Stephanie was malnourished, disbelieve the State's experts on the issue of causation, and believe Dr. Nielsen's speculative theory of causation while rejecting her testimony concerning malnutrition. Given the nature of the evidence, we do not agree that the jury could rationally engage in such mental gymnastics. We overrule appellant's first supplemental point.

Appellant's second supplemental point challenges the admission of the testimony of one of the State's expert witnesses, Dr. Pence. Appellant characterizes the testimony as presenting novel theories and opinions although she "lacked the expertise to make them admissible." The admission of expert testimony is governed by Rule 702 of the Texas Rules of Criminal Evidence. That rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The decision whether to permit the testimony of an expert witness is within the discretion of the trial court, *Duckett v. State*, 797 S.W.2d 906, 910 (Tex.Crim.App. 1990), and will not be overturned absent an abuse of that discretion. *Amos v. State*, 819 S.W.2d 156, 163 (Tex.Crim.App. 1991), *cert. denied*, 504 U.S. 917, 112 S.Ct. 1959, 118 L.Ed.2d 561 (1992). The primary consideration is whether the expert's specialized knowledge will assist the trier of

fact. *Pierce v. State*, 777 S.W.2d 399, 414 (Tex.Crim.App. 1989), *cert. denied*, 496 U.S. 912, 110 S.Ct. 2603, 110 L.Ed.2d (1990). Rule 702 is not satisfied when the witness's knowledge or expertise is unlikely to exceed the common knowledge or reasoning of the jurors. *Id.*; *Alba v. State*, 905 S.W.2d 581, 592 (Tex.Crim.App. 1995).

Careful examination of appellant's argument in support of this point fails to reveal any reference to testimony presenting the "novel theories" he seeks to challenge; however, there are specific references to testimony that appellant argues was beyond the expertise of Dr. Pence.

As recited above, Dr. Pence held a Ph.D. and was an associate professor of pathology who studies and teaches nutrition. Appellant complains that Dr. Pence's statements that children who are not fed properly often have behavioral problems because they are constantly hungry were improperly admitted, because she was not a psychologist or medical doctor. We cannot agree. Dr. Pence's experience in the study of nutrition is sufficient to justify the trial court's evident belief that those who have engaged in the study and effects of nutrition are competent to testify about the physical and behavioral effects of a lack of proper nutrition. The trial court did not err in admitting such testimony.

Appellant also complains of Dr. Pence's testimony that overfeeding a severely malnourished person can cause heart failure, because Dr. Pence was not a medical doctor or cardiologist. In response to defense questions on voir dire, Dr. Pence testified that the issue of heart failure was one of the topics she teaches to medical students. We are not prepared to hold that a person qualified to teach a topic to medical students is not qualified to give expert testimony on that same topic. Appellant's seventh point is overruled.

In sum, all of appellant's points are overruled and the judgment of the trial court is affirmed.

John T. Boyd
Justice

Do not publish.

APPENDIX F

NO. 07-94-0166-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL B
MAY 30, 1996

PATRICIA CARMAN, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE 364TH JUDICIAL DISTRICT COURT
OF LUBBOCK COUNTY.
NO. 92-415352;
HONORABLE BRADLEY S. UNDERWOOD, JUDGE

Before DODSON, BOYD and QUINN, JJ.

In eight points of asserted error, appellant Patricia Carman challenges her conviction of intentionally or knowingly, by omission, causing serious bodily injury to a child and the consequent jury-assessed punishment of 50 years confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant's prosecution arose out of the death of her seven-year-old stepdaughter, Stephanie Carman, on June 8, 1992. The State alleged her death was the result of malnutrition. She and her husband, Steven Carman, Stephanie's natural father, were charged and tried before a jury in a joint trial that lasted five weeks. The trial involved extensive expert testimony bearing on

Stephanie's condition and the cause of her death. For reasons we later express, we affirm the judgment of the trial court.

In her eight points, appellant contends 1) the evidence is legally insufficient; 2) the evidence is factually insufficient; 3) the trial court erred in admitting Steven's statement in violation of appellant's Sixth amendment right of confrontation; 4) she was entitled to a new trial based on misconduct of a juror; 5) there was improper admission of reputation evidence at the punishment phase; 6) the trial court erred in refusing to instruct the jury on the lesser-included offense of endangering a child; 7) the trial court erred in admitting opinion testimony by an unqualified expert witness; and 8) the trial court erred in refusing an instruction on criminal negligence.

The nature of appellant's challenge in her first two points requires us to recount the relevant evidence in some detail. It also requires us to review the standards by which such challenges are measured. When reviewing the legal sufficiency of the evidence, we are to apply the standard articulated in *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and *Turro v. State*, 867 S.W.2d 43, 47 (Tex.Crim.App. 1993). Under this standard, evidence is legally sufficient to sustain a conviction if, when viewed in the light most favorable to the verdict, a rational factfinder could find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 433 U.S. at 319. This standard of review is applied whether the conviction is based on direct or circumstantial evidence. *Alexander v. State*, 740 S.W.2d 749, 757 (Tex.Crim.App. 1987), *cert. denied*, —— U.S. ——, 114 S.Ct. 1869, 128 L.Ed.2d 490 (1994).

The recent Court of Criminal Appeals decision in *Clewis v. State*, No. 450-94 (Tex.Crim.App. January 31,

1996), instructs that when the factual as well as the legal sufficiency of the evidence is challenged, if, after applying the *Jackson v. Virginia* test we determine the evidence was legally sufficient, we must proceed to examine the evidence without the prism "in the light most favorable to the prosecution." *Clewis*, slip op. at 11. We are, rather, to examine all the evidence, and if our review convinces us that the jury verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, we remand the case to the trial court for retrial before another jury. *Id.*

We are cautioned to give proper deference to the decision of the jury and not to attempt to reweigh the evidence and set aside a jury verdict merely because a different result seems more reasonable. Indeed, the *Clewis* court quoted and adopted the requirement set out by the Texas Supreme Court in *Pool v. Ford Motor Co.*,715 S.W.2d 629 (Tex. 1986), that courts of appeals, when *reversing* on factual insufficiency grounds, must detain the evidence relevant to the issue in consideration and clearly state why evidence is so insufficient that the jury's verdict is manifestly unjust, why it shocks the conscience or clearly demonstrates bias, and in what regard the contrary evidence outweighs the evidence in support of the verdict. *Clewis*, slip op. at 14. It is under the standards for both legal and factual sufficiency that we review the evidence in this case.

The State presented the testimony of Wilma Manning, an employee of the Texas Department of Protective Services. She described a telephone call she received from appellant between 4:00 and 4:30 p.m. on June 8, 1992. According to Manning, appellant repeatedly described Stephanie's medical and mental problems, including an eating disorder, compulsive behavior and Attention Deficit Disorder. Manning described appellant's speech as loud and continuous, with little opportunity for Manning to talk. In

response to Manning's suggestion to take Stephanie to a doctor, appellant expressed concern about being accused of misconduct. The call ended when Manning heard a male voice yelling and appellant said, "Oh, my God, I have got to call 911," at which time appellant hung up the phone.

The State also presented the testimony of the paramedics who initially responded to appellant's 911 call. Lloyd Cody, the first paramedic, described Stephanie as "malnourished" because her eyes were sunken and all of her ribs were clearly visible. His initial opinion was that she had some serious medical problem or had not been eating. When he first saw her, Stephanie was not breathing and her heart was not beating. Cody described the room Stephanie was in as "barren" with just a few articles of furniture. When shown photographs of the room taken on June 10, 1992, he said the toys and some of the furniture shown in the photographs were not present on June 8 when he saw the room.

A second paramedic called by the State, Robert Mello, also described the room in which Stephanie was found as dark and barren with only a bed, a nightstand, some empty shelves and a chair. Mello's description of Stephanie was "emaciated," "like one of the kids from like a concentration camp or something." He characterized appellant as very calm. This description of appellant was not consistent with the EMS (emergency medical services) report written by paramedic Tommy Crawford which described appellant as distraught. Appellant told Mello that Stephanie had not been eating for two weeks. In his testimony, Mello described some of the medical procedures taken with Stephanie, including the administration of intravenous fluids (IV).

The State next called Jeanette Whalen, an officer with the Lubbock Police Department who responded to the Carmans' call for help. She also testified that many of the items in the photographs taken two days later, such as the dolls and other toys, were not present on June 8. She stated that the reason she remembered the toys shown in front of a window in some of the photographs were not there on June 8 was because she specifically remembered another officer walking to the window and opening the blinds to provide more light for the EMS personnel; however, she did identify a dresser that Mello testified was not present as being in the room on June 8.

Whalen described appellant as crying but not hysterical. When Whalen sought to obtain some medical history, appellant told her that Stephanie suffered from Post-Traumatic Stress Disorder as a result of mistreatment by her natural mother. Appellant also related that she "had not been able to get Stephanie to eat at all" the previous week. Stephanie was taken to University Medical Center where she was soon pronounced dead. Because of the circumstances surrounding her death, an autopsy was requested by a Justice of the Peace.

Wayne Casey, another officer of the Lubbock Police Department and the principal investigator in the case, described his involvement beginning with his attendance at Stephanie's autopsy on the evening of June 8, 1992. In addition to Casey, others present at the autopsy were Sergeant Bill Hubbard, Dr. David Hoblit (who performed the autopsy), his assistant, an ophthalmologist, and Dr. Garcia, who had seen Stephanie as a patient on previous occasions. Casey described Stephanie as very thin with visible ribs and sunken eyes. Her skin was "very, very pale," she had abrasions and bruises on various parts of her body and very

thin hair with some patches missing. It was his impression that she had a long term illness or had been abused.

Casey, Hubbard, and another officer went to the Carmans' home on June 10, 1992 to investigate her death. Granted permission to inspect the home, the officers noticed that both the door to Stephanie's room and the door to her closet had chain-type locks mounted very high on the doors, well out of a seven-year-old's reach. Hubbard took photographs of Stephanie's room. The Carmans told the officers that Stephanie had been very disturbed and difficult to handle. They explained that several stains on the carpet were due to the fact that Stephanie would urinate and defecate in her room. The Carmans also provided the officers with a written record of what Stephanie had eaten the previous week, from Monday, June 1 through Saturday, June 6, with two notations labeled only Sunday and "Today, Mon." This information was written on an envelope postmarked in Hobbs, New Mexico on June 5, 1992.

Through Casey, the State introduced a chart that the family had on the wall of Stephanie's room that was used to record her height and weight. A notation on the chart showed that Stephanie weighed 57 1/2 pounds when she was seven years and nine months old. At the time of her autopsy approximately a month later, Stephanie's weight was 43 1/2 pounds. Concerning the toys he found in Stephanie's room, Casey described them as brand new. He also found additional new, unopened toys in her closet along with new dresses that still had store tags on them.

Casey interviewed and took written statements from appellant and Steven Carman. In appellant's statement, she described Stephanie as stubborn and willful and admitted that she had occasionally locked Stephanie in her room. Appellant also stated she had "used food items as an

incentive with [Stephanie]." According to her, appellant had to "force feed [Stephanie] for about a week." Concerning the day that Stephanie died, appellant's statement described Stephanie as "mopey" as though she were seeking sympathy. The statement provided that Stephanie did eat some pudding while appellant's sister-in-law Carla was there that afternoon and described the events that followed:

> [S]he got on the edge of the chair and just slid out of the chair and her butt hit the floor and she just went [] onto her back hard. She was just laying there looking. She didn't look like she was sick. She got up in that mopey kind of way and got some water. She did it like she was faking because she had faked it before.
>
> Carla left and when I checked on Steph she was laying on her back in her room holding her knees in the air. I mixed an Ensure shake for her and I took it to her and she sat in her blue plastic chair. She drank a little of the shake and half a glass of water. I decided to take her to the hospital. I asked her if she was hurting anywhere but she wouldn't answer me. She was leaning in the chair. I was looking at her to see if she was faking. I told her if she didn't answer me I was going to take her to the hospital. She told me no, she was tired and wanted to rest. When I left the room she was still in the chair but was acting like she was fixing to get up. I called Christine at Social Service but she wasn't there but I talked to her supervisor. I was nervous that something was wrong, that Stephanie was faking it but the water and the fact she wouldn't answer me scared me and she was hurting but wouldn't tell me. She didn't appear sick. I'm not sure what I said. Steve came home while I was on the phone and

walked in the back. He ran up the hallway and said, "call 911, I think she's dead." I dialed 911.

Casey admitted that although appellant had described using M&M candy as a reward when Stephanie would complete a school lesson, when he wrote the statement he only included that appellant used food as a reward and incentive. He did not record any part of appellant's oral statement and disagreed with the idea that a tape recording "would be a good way to check and make sure everything is accurate."

Casey also interviewed the couple's other daughter, Loretta Carman, while she was staying with family friends in New Mexico. Before that interview, the attorneys representing appellant and Steven Carman requested to listen to the interview by telephone, to have the interview recorded, or to allow JoAnn Jackson, the family friend with whom Loretta was staying, to be present. Casey refused all three requests. He described Loretta's responses during the interview as "coached." He said that she was flippant and used words that were not typical for her age but were used by her parents.

Casey also disagreed with the view, even if it came from Dr. Hoblit, that any of the bruises on Stephanie's body were natural rather than the result of abuse. On cross-examination, Casey went so far as to say that it was possible for him to determine whether a child has been abused based on what is present in or absent from a child's room.

Stephanie's natural mother, Myrtis Carman, described Stephanie's early childhood. The State introduced several photographs of Stephanie which Myrtis identified. She characterized Stephanie as "chubby" in several of the photographs and denied ever giving Stephanie alcohol in her

bottle so she would sleep. According to Myrtis, Steven Carman talked her into letting Loretta and Stephanie stay with him to attend school for one year. At the end of the year she reluctantly permitted Steven Carman and appellant to keep the girls.

The State called Tammy Fowler, a special education teacher at Parsons Elementary where Stephanie Carman attended school. Fowler taught a class designated as a "social adjustment" class for students diagnosed as emotionally disturbed. Fowler described Stephanie as a very sweet girl who loved attention. She felt that most of Stephanie's misconduct was an effort to get more attention from her. She said that Stephanie never had a problem with wetting her pants at school. The teacher said appellant was involved in Stephanie's education and would communicate with her on a regular basis; however, Fowler did not always agree with appellant's view of what was in Stephanie's best interest.

Fowler stated that she used food as part of a program of "rewards and consequences." This involved occasionally giving treats like candy to students for good work and making them complete projects before having lunch. She said that appellant instructed her not to allow Stephanie to participate in other student's birthday parties at school. While she was in Fowler's class, Stephanie usually brought her lunch to school. Sometimes it was just a sandwich with a note from appellant that Stephanie was not to have anything else.

The State presented several notes appellant had written to Fowler. These notes included requests that Fowler not give Stephanie rewards such as candy or small gifts (such as an eraser), or that Stephanie not brush her teeth at school because "this is very unsanitary with all the diseases going

around." Another note instructed Fowler to limit the time in which Stephanie was allowed to eat her lunch stating, "She is very able to eat what I put in her lunch box within 15 to 30 minutes. She should not have any food left over. The only reason she would is she is being distracted from the task of eating - and she must be focused!!" Fowler also commented that appellant told her that they had guarded the refrigerator to keep Stephanie out of it.

In describing her opinion of the relationship between Stephanie and appellant, Fowler thought that Stephanie was somewhat afraid of appellant. She never saw the two touch each other and sometimes appellant was very abrupt with Stephanie. Stephanie was only in Fowler's class from August 1992 to the following February, when the Carmans took her out of school to teach her at home.

The State next called Christy Brabec, a friend of Stephanie's older sister Loretta. Brabec described the two times she visited the Carmans' home. One occasion was to go swimming in the Carmans' swimming pool and another was a birthday party for Loretta. On the first occasion, Brabec was only in the house a few minutes but on the second occasion, she and other guests stayed overnight. Brabec said that she did not see Stephanie on either occasion but did see a door that was closed while she was there. She conceded that Stephanie could have been visiting one of her friends at the time.

Shelly Carman, Stephanie's cousin, related her experiences when visiting Stephanie's home. According to Shelly, Stephanie did not play with the other children and was not allowed to eat with the family. She remembered appellant would fix a small plate for Stephanie after the others had eaten. Shelly also said that Stephanie did not participate with the rest of the family in opening presents on

Christmas. Shelly also described playing with Stephanie in her room the Christmas before her death. She also averred that almost all the toys and furniture shown in the photographs taken June 10, 1992 were present the previous Christmas.

Harold Marlowe, a pharmacist at a pharmacy near the Carmans' home in June 1992, testified that appellant came to his store on June 3, 1992 and asked what to give her child who had not eaten in four days. Marlowe recommended Ensure, which appellant purchased. Apparently seeking to cast doubt on his memory concerning the date of the purchase, the defense produced a receipt dated June 8 showing the purchase of a case of Ensure from Marlowe's store and signed by appellant's mother, Phyllis Reynolds. The State next called Dominga Bates, who visited her mother, a neighbor of the Carmans, on a daily basis. She described seeing appellant and Steven Carman with their older daughter Loretta on many occasions, but she had never seen Stephanie with them.

The State also called Barbara Pence as an expert witness. Dr. Pence held a Ph.D and is an associate professor of pathology in Lubbock. She studies and teaches nutrition. Dr. Pence began by explaining charts used by doctors to plot the growth of children. She described that in their early years children typically grow at a predictable rate and maintain an approximately constant position relative to their peers. A child whose size and weight put her in the 50th percentile at one year old would normally be expected to be very near the 50th percentile at six years old. According to Dr. Pence, a significant change in the percentile ranking of a child would indicate a problem of some type. the State produced a chart showing that Stephanie's weight at the time of her autopsy was below the 5th percentile based on her height. Dr. Pence also reviewed medical records of

Stephanie's growth from ages 10 months through 31 months. During that time the records indicated Stephanie was between the 80th and 95th percentile of weight for her height and that growth was normal.

Dr. Pence next discussed the process of malnutrition. She described two types of malnutrition which may both exist in varying degrees. The first, Marasmus, is a decrease in the total number of calories needed, the second, Kwashiorkor, is a severe protein deficiency. She described the symptoms of Marasmus as a "wasted" appearance where bones are clearly visible. This is a result of the body breaking down fat, and eventually muscle, for energy. Symptoms of Kwashiorkor include altered pigmentation of a person's hair, a buildup of fat in the liver, and anemia.

Dr. Pence examined the autopsy records and photographs and was questioned concerning her opinion of whether Stephanie suffered from malnutrition. Dr. Pence opined that Stephanie was "very poorly nourished" based on her physical appearance including visible bones, bruises and loss of hair. However, Stephanie's physical appearance was also consistent with other conditions, such as cancer. By using other information from the autopsy such as anemia, low blood protein levels and fat changes in the liver she concluded that Stephanie was suffering from a combination of Marasmus and Kwashiorkor, and that it was the result of al least six months of malnutrition.

Dr. Pence described a syndrome called Psychosocial Deprivation Dwarfism where parents describe their children as eating excessively. Parents will restrict the child's diet to the point where the child becomes malnourished. The child will exhibit behavioral problems as a result of inadequate nutrition often leading to further restrictions of food.

Over appellant's objection, Dr. Pence testified that a sudden increase in food intake could cause a severely malnourished person to experience heart failure. This is the result of a weakened heart being unable to supply the blood needed by the stomach and intestines. The autopsy indicated that Stephanie had a significant amount of food in her stomach when she died. In her review of the blood analysis from the autopsy report, Dr. Pence noted several unusual values, including low red blood cell count and blood proteins, albumin in particular. Stephanie also exhibited a high value for creatinine which indicated to her the breakdown and use of muscle tissue for energy. Dr. Pence felt that a person with the low amount of albumin present in Stephanie's blood would have been very lethargic and probably unable to walk in the hours before the blood sample was taken. She also agreed that it is possible in some circumstances that a child could lose well over half their body weight yet survive. She distinguished those cases from Stephanie's condition, citing the low blood protein levels and anemia.

In cross-examining Dr. Pence, the defense cited an article on Psychosocial Deprivation Dwarfism relied on by Dr. Pence. In that article, the doctor discussed several tests and background information required to diagnose that condition. While Dr. Pence conceded that the tests had not been performed, she also asserted that the tests could not be performed after death. She also rejected the defense's contentions that the blood tests were distorted by the IV solution.

Dr. David Hoblit performed the autopsy on Stephanie. His testimony began with a description of his background and training. Dr. Hoblit recounted that his residency included work in forensic pathology and that he worked as an associate medical examiner in Corpus Christi. He taught

pathology at the University of California in the early 1970s and had an article published in 1974. Although Dr. Hoblit was board certified in clinical pathology but not forensic pathology, he estimated that he had performed some 800 autopsies, 400 of which were forensic autopsies. He described his familiarity with research on deaths related to malnutrition, which were typically the result of improper efforts at weight reduction. He also stated that he participated in the autopsies of two women who died from misuse of diet pills. Dr. Hoblit helped design the laboratory monitoring portion of a weight reduction program operated in California.

Dr. Hoblit described the steps he took in conducting the autopsy of Stephanie Carman. He began by obtaining the records made in the emergency room. Before conducting the autopsy, Dr. Hoblit contacted Dr. Garcia, a pediatrician and director of a child abuse center, an ophthalmologist, and a photographer. He also requested x-rays of Stephanie's entire body. When he weighed her on a scale provided by the University Medial Center, Dr. Hoblit found that Stephanie weighted 43.8 pounds.[1] According to measurements made about 18 months prior to her death, her weight put her between the 50th and 75th percentiles. Based on continued growth at a normal rate, Hoblit estimated that Stephanie should have weighed between 58 and 66 pounds.

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[1] In response to defense challenges to the accuracy of the scale, the State called the Nursing Supervisor at University Medical Center, Nancy Smith. She provided the scale that Dr. Hoblit used to weigh Stephanie before the autopsy. Smith described how the scale is stored and calibrated before use. She was also present when Dr. Hoblit weighed Stephanie twice. She calibrated the scale between the first and second weighings and remembered that the scale indicated the same weight both times.

Dr. Hoblit found that Stephanie's has only 0.5 centimeters of subcutaneous fat. He had never seen a person with a measurement of less than 1.2 centimeters. He also found 25 to 35 percent hair loss. According to the medical literature upon which he relied, hair loss begins four to six weeks after significant nutritional deprivation. Stephanie's hair also exhibited hypopigmentation (loss of pigment) which results from periods of severe protein deprivation.

In examining x-rays of Stephanie, Dr. Hoblit found "growth arrest" lines in the long bones. Malnutrition is one of the causes of growth arrest. Dr. Hoblit described Stephanie's heart weight as 22 to 26 percent less than what it should have been. He stated flatly that that condition was life threatening and caused Stephanie's death. He also stated that her hemoglobin value of 4.5, less than half a normal value, could have independently caused her death. Malnutrition can also cause a reduction in hemoglobin. He found such a reduction in Stephanie's blood. Stephanie's serum protein was 2 grams when a normal value is between 6 and 8 grams, which the doctor also attributed to malnutrition. According to Dr. Hoblit, Stephanie's blood pH of 6.8 was significantly below the normal of 7.4 and was also a life threatening condition. He attributed to low pH value to the use of fat stores for energy. His tests revealed no drugs in Stephanie's body at the time of her death. He also stated that the IV fluids given would not have altered these findings.

Dr. Hoblit described Stephanie as exhibiting all ten symptoms listed in medical texts for Kwashiorkor. He also described two types of malnutrition: primary, where there is an inadequate diet; and secondary, where the malnutrition results from an inability to absorb or use nutrients. His examination of numerous internal organs convinced him that there was no possibility of secondary malnutrition. He

described Stephanie's heart as "absolutely 100 percent diagnostic of [Kwashiorkor'." Examination of Stephanie's lungs did not show that aspiration of food particles was a cause of her death; however, he did find extensive loss of muscle in her diaphragm, which would have affected her ability to breath.

Dr. Hoblit also described the examination of Stephanie's stomach. He determined it was 40 to 50 percent full and specifically noted that it contained identifiable cubes of potatoes that showed no sign of having been chewed; however, it did not contain any pills. The stomach contents he examined were not consistent with the list of Stephanie's meals that appellant gave the police. In response to a hypothetical question from the State, Dr. Hoblit opined that even if aspiration of food was the actual cause of Stephanie's death, her other conditions were extremely life threatening.

On cross-examination, the defense initially explored the relationship between Dr. Hoblit and Lubbock County. Beginning in May 1992, Dr. Hoblit negotiated with Lubbock County to hire forensic pathologists to perform autopsies for the County. On July 16, 1992, the County entered into a $200,000 per year contract with Dr. Hoblit's association. After having offers rejected by two candidates, he hired Dr. Jody Nielsen, who left for a job in Beaumont shortly after arriving. When asked why she left, Dr. Hoblit gave specific examples of problems. He recounted three incidents where Dr. Nielsen objected to his scheduling autopsies she was to perform, rather than directing requests for autopsies to her to schedule. She objected to law enforcement officers "looking over her shoulder" when performing autopsies. Dr. Hoblit also described her as being friends with Sergeant Bill Hubbard of the Lubbock Police Department. This friendship caused additional tension when Hubbard became the target of an investigation by the Lubbock County District Attorney.

The defense then re-examined the possible IV contamination of the blood samples. Dr. Hoblit stated that the amount of calcium in Stephanie's blood was high, contrary to what would be expected in a malnourished person; however, one of the IV solutions administered to Stephanie contained calcium. Because he characterized non-congenital thyroid disease before adolescence as "almost nonexistent," he examined the thyroid only generally and did not dissect it or prepare slides from it. Finally, he described malnourishment as a diagnosis of exclusion only to the degree that secondary malnutrition must excluded to diagnose primary malnutrition.

The State's next witness was Dr. Ewell Clarke, a pediatric radiologist who teaches at the University of Texas at San Antonio. Dr. Clarke examined the x-rays of Stephanie taken after her death. He described two abnormal findings present in the x-rays. First, there was no detectable subcutaneous fat which is normally visible, although the muscles were within normal limits. Second, there were several growth arrest lines present in the bones of Stephanie's legs. These growth arrest lines indicate some severe stress such as cancer, a surgery, deprivation of food or inability to absorb food. He indicated that the causal stress occurred within the previous 9 to 12 months.

Although he acknowledged on cross-examination that he had seen hyperthyroidism in a seven year old, he was not asked whether those cases involved congenital conditions. He opined that he had never seen a case where growth arrest lines were the result of emotional disturbance, although he was aware of the possibility of such cases through his perusal of medical literature. Dr. Clarke estimated that he would expect to find growth arrest lines in about 10 percent of children.

The State then called Nina Stolzenberg, an intern in child psychology who saw Stephanie from August 1990 through July 1991. She described Stephanie at that time as thin, but not so thin as to cause concern. One of the tools Stolzenberg used to evaluate a new patient was to ask what they would wish for if they had three wishes. Stephanie's wish was for a fork, a knife and a spoon. Stolzenberg testified that Stephanie did very poorly on some standardized tests. The Carmans had expressed concern to Stolzenberg that Stephanie had been given strong alcohol and been undernourished when she was an infant and that may have impaired her development. Stolzenberg described the Carmans' participation as minimal, giving as an example their canceling or failing to show up for at least 20 percent of the appointments that were made. The therapy ended at the request of appellant.

The State next called Dr. Robert Bux, a medical examiner from Bexar County certified in anatomical, clinical and forensic pathology. Dr. Bux examined the results of Stephanie's autopsy and gave his opinion as to her death. He began by noting several abnormalities in the blood tests, specifically high calcium, low sodium, and extremely low protein, hematocrit and hemoglobin. Dr. Bux dismissed the calcium and sodium values on the basis that the samples were "valid."

Dr. Bux also noted the absence of subcutaneous fat in the x-rays and photographs taken at the autopsy and the growth arrest lines in the x-rays. The condition of the food found in Stephanie's stomach indicated to him that she had eaten just before she dies. Because of the lack of inflammation in the lungs, Dr. Bux believed that any aspiration of food occurred essentially at the time of her death and was probably a result, rather than a cause, of her death. He also noted the loss of muscle in her diaphragm

and the fibrosis in her heart, both of which are consistent with malnutrition. The autopsy information did not show any form of cancer or other medical problem that might have accounted for Stephanie's emaciated condition. Dr. Bux concluded that Stephanie suffered solely from starvation and malnutrition due to lack of food. This was so even though the autopsy showed several organs, including the spleen, thyroid, adrenal glands, and the endocrine system were normal.

In response to defense evidence suggesting the existence of other causes of Stephanie's condition, the State called Dr. Wilhelmina Tengco, a child psychiatrist who had treated Stephanie in 1990. Based on her examination and treatment of Stephanie, Dr. Tengco determined that she did not suffer from an eating disorder, hyperthyroidism, leukemia or inability to absorb nutrients. However, on cross-examination she admitted that she did not perform any laboratory tests for any of these conditions. When queried, Dr. Tengco disagreed with the proposition that emotional problems affected physical growth.

The defense began its case in chief by calling Tommy Debs Crawford, another paramedic who responded to appellant's 911 call. He was the first emergency medical person at the scene and wrote the emergency medical service report on the event. When he first arrived, Steven Carman was attempting to clear Stephanie's mouth so she could breath. When Crawford began working on Stephanie she had no pulse and a "huge" amount of vomit in her mouth had to be cleared away. With the assistance of other paramedics, Crawford was able to force oxygen into Stephanie's lungs using a tube; however, the low level of oxygen subsequently found in Stephanie's blood indicated that the CPR was generally not effective.

Crawford's report described Stephanie as "unresponsive," meaning there was no reaction to any stimuli, including pain. It was his opinion that Stephanie had been in that condition for "awhile" before they were called. He described appellant as "tearful and distraught." When he questioned appellant about Stephanie's doctor, she replied that Stephanie did not have one. Crawford also confirmed the other paramedics' description of the room as very bare, with only a bunk bed and a chest.

The defense also presented the testimony of Irwin Okun, the Carmans' neighbor. Although he admitted having Alzheimer's disease, Okun remembered seeing Stephanie on two specific occasions and that she seemed normal. Loretta visited the Okuns on several occasions but Stephanie and her parents did not.

Cora Colleen Riley Carman, who goes by "Carla," is married to Steven Carman's brother and has worked as a nurse's aid. She visited appellant's home at least once or twice a week, often accompanied by her children. Carla's family would often celebrate holidays at Steven and appellant's home. Many of these visits included having meals together. On those occasions Stephanie ate with the rest of the family. She directly contradicted the testimony of Shelly Carman, stating that appellant and Steven Carman never deprived Stephanie of food or kept her locked in her room. According to Carla, the only time Stephanie was required to stay in her room was to finish schoolwork. She also stated that Shelly had never been at appellant's home without Carla and also contradicted Shelly's description of Stephanie's exclusion from the Carmans' Christmas Day activities.

Carla testified that she had been in Stephanie's room on many occasions, including the week before her death, and

that the room was always as it appeared in the photographs taken shortly after Stephanie's death. She described Stephanie as having a short attention span, developing slowly and more likely to have emotional outbursts than most children. As long as she had known Stephanie, she was "just a little, skinny, little kid" and had not suffered any noticeable weight loss.

On the day Stephanie dies, Carla left work at 3:15 p.m. and went to appellant's house. Upon greeting her at the door, appellant told Carla that Stephanie would not eat and had not eaten all day. Although Stephanie would not talk to Carla, she did eat some pudding at Carla's request. After eating, Stephanie went to the sink and got a glass of water. Carla described Stephanie's walk to the sink as skipping or hopping. After drinking the water, she returned to the table and "lowered herself down" to the floor and sat there.[2] Carla and appellant discussed taking Stephanie to a doctor because of Stephanie's failure to eat, and appellant told Carla that she would probably take Stephanie to a doctor after Steven got home. When Carla left the house at about 4 p.m., Stephanie was lying on the floor by her bedroom, but that did not strike her as unusual. Shortly after she arrived home, Steve Carman called to tell her that Stephanie had been taken to the hospital. Carla, her son, and her husband went to appellant's house and then to the hospital with Steven Carman. She described Steven as being in a "state of numbness."

Daniel Carman, Carla and Michael Carman's son and Stephanie's cousin, spent the last six weeks of the 1991-1992 school year at appellant and Steven Carman's home,

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[2] Carla acknowledged that there was a slight discrepancy between her account and appellant's, which described Stephanie slumping out of a chair onto the floor.

returning to his own home a week before Stephanie's death. He testified that during his stay he ate with the Carmans and Stephanie always ate with the family. He also played with Stephanie in both the front and back years of the house, although he did say she spent most of her time in her room. Daniel had been in Stephanie's room on many occasions and said that it always appeared as it did in the June 10 photographs. Daniel also contradicted Shelly's account of the previous Christmas, saying Stephanie was not excluded from the family's activities. On the day Stephanie died, Daniel was at the Carmans' house from early morning until his mother took him home at about 4 p.m. He saw Stephanie walking around the house earlier in the day and said she was acting normally at that time.

Daniel's sisters Sybil and Paulette, echoed much of his testimony. They had also visited the Carmans' house on many occasions, often spending the night. Both stated that Stephanie regularly ate with the rest of the family. They remembered Stephanie's room being as it appeared in the June 10 photographs. The only time Sybil was aware that Stephanie was required to stay in her room was when she was "in trouble" with her parents. The sisters last saw Stephanie a week before her death and did not perceive that anything was wrong with her.

Stephanie's sister, Loretts, testified that she saw their natural mother put Everclear in Stephanie's bottle on many occasions. Loretta described the bottle and recalled reading the label. She also contradicted Shelly Carman's claim that Stephanie did not eat with the rest of the family. Loretta also disputed the State's evidence that Stephanie's room was barren. A videotape introduced through Loretta showed Stephanie participating in Christmas activities in 1990 and 1991; however, the tape purported to be the Christmas 1991 tape showed only members of the immediate family and did

not show Loretta and Stephanie's cousins, or Carla and Michael Carman, as being present that day. In response to questions by the State, Loretta could not identify any photographs or videotapes made between Christmas 1991 and Stephanie's death the following June. Loretta also testified that on June 8, 1992, Stephanie looked and acted normally. When Steven came home from work that day, Steven asked Loretta to make coffee for him, walked toward the master bedroom, and saw Stephanie lying on the floor of her room. Steven then ran back to the kitchen and told appellant to call 911.

Describing her interview with Wayne Casey in New Mexico, Loretta denied that she had been told what to say and said Casey was the only person who pressured her to make particular statements.[3] She described previous occasions when Stephanie would refuse to eat for a few days and told Casey that on occasion Stephanie would eat too much. Loretta knew that there was a lock on Stephanie's door that was used to keep her from getting up at night and eating "a lot." Loretta then denied initialing the pages of her statement and suggested that Casey put them on the statement.

A family friend, JoAnn Jackson, testified that she and her family spent the Memorial Day weekend before Stephanie died with the Carmans. Jackson, who had raised nine children, described Stephanie's appearance as normal. The only difference she observed in Stephanie's appearance between Memorial Day 1992 and the previous visit in April

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[3] In response, the State called Ann Garton, an employee of a New Mexico social service agency who was present during Loretta's interview with Detective Casey. She testified that Casey did not make any attempt to intimidate or pressure Loretta into giving particular answers to his questions.

1991 was that Stephanie was taller; however, as the State pointed out, Stephanie had grown less than an inch in that period. Jackson described Stephanie's room as it appeared after her death. She also stated that Stephanie ate with the family and occasionally ate a large amount.

The defense medical expert was Dr. Jody Nielsen, a forensic pathologist working in Beaumont. Dr. Nielsen examined the autopsy report and much of the evidence on which it was based. She was of the opinion that the small abrasions pointed out by the State's experts actually occurred after death. She discounted the hair loss saying it was consistent with Stephanie pulling her hair out and that there was evidence of new hair growth. Dr. Nielsen was critical of Dr. Hoblit's failure to preserve a hair sample that illustrated the loss of pigmentation he found indicative of malnourishment, suggesting instead that the photographs of Stephanie's hair merely showed reflections of light. Concerning the exclusion of secondary malnutrition through an inability to absorb nutrients, Dr. Neilsen stated that the slides made of Stephanie's intestine no longer showed the structures needed to make that determination. She made a similar assertion with regard to excluding the existence of leukemia, contending that a bone marrow sample was necessary.

Dr. Nielsen disagreed that there was fatty metamorphosis in Stephanie's liver She found that the fat layer around the heart was normal for a child and that the heart weight was normal. She said these findings were inconsistent with malnutrition. She also suggested that Dr. Hoblit "doesn't know what a child's heart look[s] like normally" and even suggested that he was "manipulating the studies to say what he wanted it to say. She challenged the electrolyte results obtained from the blood samples on the basis that blood is not an accurate indicator after death and

opined that testing the vitreous fluid was required. According to Dr. Nielsen, Stephanie's subcutaneous fat measurement of 0.5 centimeters was normal. In her opinion, none of the autopsy findings are pathonomic or diagnostic of malnutrition.

In Dr. Nielsen's opinion, hyperthyroidism could account for both increased activity level and metabolic rate resulting in weight loss. One of the hormones that would indicate hyperthyroidism, T4, could be tested after death, but this test was not performed on Stephanie. She also noted that no samples of the thymus, adrenal glands, or pancreas were taken, although each would show evidence of malnutrition. In her opinion, because of Stephanie's psychiatric problems and eating disorder, the growth charts described by Dr. Pence did not apply to Stephanie. Suggesting that Stephanie's death could have been the result of another disease, Dr. Nielsen pointed to a blood culture that indicated the presence of beta strep group b, an infectious organism that "has caused death . . . even in normal healthy people."

On cross-examination, the State elicited the fact that Dr. Nielsen had never performed an autopsy where malnutrition was determined to be the cause of death nor had she received training in the field of nutrition. She also declined to estimate the number of autopsies she had performed on children. Dr. Nielsen admitted that she was not familiar with Stephanie's previous medical history, but she did not think knowledge of that history was significant in determining the cause of Stephanie's death. She also admitted she had not reviewed all of the autopsy results and, in particular, she had not examined the x-rays relied on by Drs. Clarke and Bux.

The defense called Steven Carman's mother, Lodina Kelly. She related that although he is large as an adult, he was very thin as a child. After Loretta and Stephanie went to live with appellant and Steven Carman, Lodina questioned Myrtis about putting Everclear in Stephanie's bottle and, according to Lodina, Myrtis did not deny it.

In her legal insufficiency argument and citing *Clark v. Procunier*, 755 F.2d 394 (5th Cir. 1985), appellant advances the proposition that if the evidence, viewed in the light most favorable to the prosecution, gives equal or nearly equal circumstantial support to guilt or innocence, then a jury must entertain a reasonable doubt. *Id.* at 396. This proposition has recently been reaffirmed by the Fifth Circuit in *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996); however, as we have stated above, in measuring the legal sufficiency of the evidence, both direct and circumstantial, we apply the *Jackson v. Virginia* test. *See Geesa v. State*, 820 S.W.2d 154 (Tex.Crim.App. 1991). Moreover, even assuming, arguendo, that the *Clark* test is applicable here, we believe the differences in the nature of the evidence presented in *Clark* and in this case are so significant as to make *Clark* inapplicable. In *Clark*, a business was burglarized and a safe containing motor vehicle inspection stickers was moved to a back door of the building. Apparently, part of the safe was outside the building. Some time later, stolen inspection stickers were found in Clark's wallet and his palm print was found on part of the safe. Thus, his conviction depended upon an inference, based on meager evidence, that he entered the building, moved the safe, and stole its contents. The court held the evidence was no more supportive of that inference than of the inference that Clark only touched the safe after it had been moved to the door; thus, was not sufficient to support a burglary conviction.

In this case, the jury's findings were more dependent upon its resolution of the conflicting evidence before it than upon inferences drawn from relatively undisputed evidence. It is well established that determining the credibility of witnesses and the weight to be given their testimony is within the peculiar province of the factfinder. *McFarland v. State*, No. 71,557 (Tex.Crim.App. Feb. 21, 1996); *Billey v. State*, 895 S.W.2d 417, 419 (Tex.App.--Amarillo 1995, pet. ref'd). This deference to the factfinder goes so far as to permit consideration of testimony that an appellate court might find incredible. *Cacy v. State*, 901 S.W.2d 691, 703 (Tex.App.--El Paso 1995, no pet.). It is only when testimony is factually impossible that it must be ignored. *United States v. Casel*, 995 F.2d 1299, 1304 (5th Cir. 1993).

The jury in this case was presented highly contradictory evidence; however, appellant has failed to identify any testimony from the State's witnesses that was factually impossible or otherwise incredible. When viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a rational factfinder to find that appellant intentionally or knowingly, by omission, caused serious bodily injury to Stephanie Carman; thus, it is legally sufficient to require submission to the jury for a guilt or innocence determination and the trial court acted properly in doing so. Appellant's first point of error is overruled.

Reiterated, consideration of appellant's challenge to the factual sufficiency of the evidence requires a review of all the evidence without viewing it in the light most favorable to the prosecution. If that review convinces us that the jury verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, we must remand the case for retrial before another jury. *Clewis*, *supra*, slip op. at 11.

We are instructed that in conducting such a review, we must not substitute our judgment for that of the jury. *Clewis*, slip op. at 12-14. Appellant argues that we "should review the evidence of Dr. Nielsen to determine whether the testimony is a *more plausible* explanation for Stephanie's death and/or serious bodily injury." (emphasis added). However, that of necessity involves a determination of the credibility of the witness and the weight to be given her testimony. This is precisely the type of review the *Clewis* court instructed us to avoid; indeed, it quoted with approval the Supreme Court's comment in *Pool v. Ford Motor Co.*, 715 S.W.2d at 634, that courts undertaking a factual sufficiency review "are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is a more reasonable." *Clewis*, slip op. at 13-14. We are bound by that instruction.

It is only when an appellate court reverses a judgment based on factual sufficiency that it must detail the relevant evidence and explain why that evidence is factually insufficient. *Clewis*, slip op. at 14 (*citing Meraz v. State*, 785 S.W.2d 146, 154 n.2 (Tex.Crim.App. 1990); *Pool*, 715 S.W.2d at 635. Suffice it to say that we have carefully reviewed the evidence recounted above. The jury's resolution of the conflicts in that evidence was well within their province and was not against the overwhelming weight of the believable or credible evidence. Appellant's second point is overruled.

In her third point, citing and relying upon *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 10 L.Ed.2d 476 (1968), appellant assigns error to the admission of Steven's written statement in violation of her sixth amendment right of confrontation. In response to that proposition, the State argues that 1) appellant waived any complaint about the admission of Steven's statement, 2) Steven's statement was

merely cumulative, and 3) a "*Bruton* error may not occur when both [defendants'] statements are entered."

In *Bruton*, the United States Supreme Court held that the admission of a non-testifying co-defendant's statements incriminating the defendant violates the defendant's sixth amendment right of confrontation. 391 U.S. at 126. *See also Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Based on its holding in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that an instruction to the jury to disregard a defendant's confession if it found the confession to have been given involuntarily was insufficient to safeguard the defendant's due process rights, the *Bruton* Court reasoned that an instruction limiting the purposes for which a jury could consider a non-testifying co-defendant's statements afforded no greater protection. *Burton*, 391 U.S. at 135. This holding was soon applied by the Court of Criminal Appeals to invalidate a prior rule allowing statements of a principal to be used in the prosecution of an accomplice. *Schepps v. State*, 432 S.W.2d 926, 943 (Tex.Crim.App. 1968) (op. on reh'g).

The relationship between co-defendants' statements was further explicated in *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). In that case, the Court overruled previous authority to the contrary and held that admission of a non-testifying co-defendant's incriminating statement was error regardless of a limiting instruction *or* the admissibility of a corroborating statement made by the defendant. 481 U.S. at 193-94. Consequently, the State's third argument challenging this point is without merit; however, the *Cruz* Court did acknowledge the possibility that the defendant's statements could render admission of a co-defendant's incriminating statements harmless. 481 U.S. at 194.

As we note, the State also argues that appellant waived any error that might have occurred when Steven's statement was admitted by failing to object to its admission. The record shows that when the officer who took the defendant's statements began to testify concerning the statements, the following colloquy occurred:

> The Court: Is there anything we need to take up before we have the jury back in?
>
> Defense: Yes, Your Honor.
>
> Court: All right.
>
> Defense: There are certain matters contained in each statement of Steve Carman that we feel like should be redacted. There is the original, and here is [sic] some of the things that we're pointing out to the court.
>
> Court: All of the highlighted portions?
>
> Defense: Well -- And let me point out to you, Judge, that this sentence right here probably needs to be -- the entire thing needs to be redacted, because if you redact one word, it's going to be pretty obvious. You know, they can fill in the blank type thing is what I'm saying. So, I think those entire sentences need to be taken out.[4]
>
> Court: All right. Have you all seen this [proposed redacted statement]?

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[4] At issue were two portions of Stephen's statement concerning appellant's fear of "Social Services becoming involved again." Appellant sought to exclude the entire sentence rather than just the word "again."

Prosecutor 1: No, your Honor.

* * *

Prosecutor 2: The second page, we don't have any problem at this point with "when we lived in New Mexico," [being taken out] but we do have a problem with "I had a concern about Pat using food as an incentive with Steph." That goes to the heart of our proof, our issue here.

Court: Well, it's pretty clear what time frame he's talking about, though. I mean, when we lived in New Mexico is the time frame.

Defense: Judge, this problem comes up a lot in federal court, and it's called the *Bruton* problem. And what happens is if Steve Carman didn't testify, and you all let that in, then I get to comment on his failure to testify to impeach this. And the, we've got two mistrials is why it should be redacted in my opinion.

The trial court removed the entire sentence about Steven's concerns when the family lived in New Mexico. It also removed two occurrences of the word "again" as described in the objection quoted below, but declined to remove all of the sentences. When the State sought to introduce Steven's statement, appellant made the following objection:

Defense: All right. Your Honor, if I need to state my objection again, I'm looking at page two on Stephen [sic] Carman's statement, wherein it says, "I remember Pat saying that she was concerned about taking Stephanie to the doctor because she thought

Social Service would get involved," and then there's a blank.

I object to that statement as a 404(b) matter, that it shows or attempts to show an act of misconduct. It's an attempt to show unfair prejudice, other than the charge we have.

Then I object, "I think it was Tuesday of last week that Pat told me she was force feeding Stephanie because she didn't want Social Services becoming involved." There is no period after it. There's just a blank. So, once again, there will be no doubt what this jury will interpret from reading this. And we submit its 404(b) matters that are -- that the Court has previously ruled are not admissible, and that therefore, Pat Carman's right to due process under the United States Constitution, Fifth and Fourteenth amendments, Article I, Section 19 of the Texas Constitution, Article 1.04 of the Texas Code of Criminal Procedure will be violated by allowing this in. I also object that it violates Bruton versus U.S. And that in final argument, there could be a requirement that I point out if Mr. Carman does not testify.

Court: All right. The objections are overruled.

Prosecutor 1: Very quickly before the jury comes back in, it's my intent --

Defense: Your Honor, I also just ask that there be a period put after those sentences.

Court: Fine. I don't have any problem with that, and I'll just put a period.

* * *

In support of its position, the State makes several arguments: 1) that the objections were only to the cited portions of Steven's statement rather than to the statement as a whole, 2) she failed to make a pretrial motion to suppress the statement, 3) she failed to seek a severance, 4) she failed to request a limiting instruction.

In order to preserve error for appellate review, a party must make a timely request, objection or motion stating the specific grounds for the ruling he desires the court to make if the specific grounds are not apparent from the record. Tex. R. App. P. 52(a). The purpose of this rule is to allow the trial court to make a determination and ruling and then proceed with the trial under the proper procedural and substantive manners, as appropriately corrected by the trial court. *Janecka v. State*, 823 S.W.2d 232, 243-44 (Tex.Crim.App. 1990) (op. on reh'g). Requiring that an objection be made at a time when there is an opportunity to respond and cure any error is dictated by considerations of fairness and judicial economy. *Young v. State*, 826 S.W.2d 141, 149 (Tex.Crim.App. 1991). Those are the justifications for the rule that in instances where a defendant's objection at trial does not comport with her complaint on appeal, nothing is preserved for review. *Cravens v. State*, 687 S.W.2d 748, 752 (Tex.Crim.App. 1985).

It is apparent that appellant's complaint on appeal is based directly on the Supreme Court's holding in *Burton*. Although appellant specifically cited *Burton* in making her objection, it appears clear to us from the objections quoted above and the way in which appellant referred to *Burton*, that the objection was to specific portions of Steven's statement, not the entire statement.

In the initial objection, appellant referred to *Burton* as support for "why it should be redacted," not why the

statement should be "excluded." Appellant's second objection that "*it* violates *Burton*" is ambiguous when taken by itself; however, when read in conjunction with the rest of the objection identifying specific portions of the statement she found incriminating, the pronoun *it* appears to refer to those specific parts of the statement rather than the statement as a whole. That being so, appellant's trial objection was not sufficiently definite to preserve her complaint that the trial court erred in admitting Steven's statement as it was admitted. Appellant's third point is overruled.

In her fourth point, appellant contends the trial court erred in overruling her motion for new trial based upon alleged juror misconduct. The facts upon which appellant bases this point involved juror Robert York and the State's witness Lloyd Cody. During voir dire, the jury panel was asked to complete a questionnaire. One of the questions asked if the panel member knew any of the potential witnesses on a one-page list. Lloyd Cody was the eighteenth of 98 names. When questioned individually, York stated that he did not know anyone on the list. At the close of voir dire, appellant renewed several challenges for cause which were denied. After using peremptory challenges to remove several panel members, appellant sought additional peremptory challenges to remove, *inter alia*, York. This request was also denied.

After Lloyd Cody testified, York notified the trial court that he knew Lloyd Cody. This resulted in a hearing on the matter. At that hearing, York described his relationship with Cody as limited to "casual contact" at church activities. Based on York's answers at that hearing, the parties made no objection to his continued participation as a juror.

In appellant's post-trial motion for new trial, she urged juror misconduct. The trial court held another hearing at which appellant presented additional evidence of York's relationship with Cody. Cody testified that his wife was York's cousin.[5] Although some years earlier they had attended family gatherings together, he said their recent relationship was primarily through church activities and they had not visited each other's homes. He and York were first acquainted through the church well before they became related. On one occasion when Cody was seventeen and York was about seven, their families had taken a vacation together. Juror York testified at the hearing that he had not seen Lloyd Cody's name on the witness list when he completed the questionnaire. Although he remembered the vacation with Cody's family, York claimed he was about 4 and did not remember Lloyd Cody being present. According to York, they had not attended a family gathering together for approximately 10 years. He averred their recent relationship had been limited to "casual" contact at church events.

It is the rule that when a juror withholds material information during voir dire, the juror denies the parties an opportunity to intelligently exercise their challenges and obtain an impartial jury. *Jones v. State*, 596 S.W.2d 134, 136 (Tex.Crim.App. 1980). Several decisions of the Court of Criminal Appeals hold that information is not "withheld" unless the juror is "ask[ed] questions calculated to bring out that information which might be said to indicate a juror's inability to be impartial and truthful. *Armstrong v. State*, 897 S.W.2d 361, 363-64 (Tex.Crim.App. 1995).

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[5] Robert York's grandmother was the sister of Lloyd Cody's father-in-law.

Initially, we disagree with the State's argument that defense counsel did not ask properly focused questions concerning this matter. The question on voir dire was simple and direct: "Do you know anyone on the one-page witness list?" When juror York became aware that he did know one of the witnesses, his negative answer to the question amounted to the withholding of evidence and required the court hearings to determine the effect of that error. Whether intentional or not, York withheld information.

We initially note the language in *Von January v. State*, 576 S.W.2d 43, 45 (Tex.Crim.App. 1978), that the significance of a juror's relationship with other participants in a trial is for defense counsel and not the juror to determine and, in order to make that determination, counsel is entitled to know the facts concerning that relationship. In *Von January*, a murder case, the foreman of the jury failed to reveal a close and long acquaintance with the family of the victim, and even though the juror recognized the victim's grandfather when he entered the court room, failed to respond to defense counsel's question whether any of the juror's knew members of the victim's family, he did not answer "because he did not have any close personal dealings with the family." *Id.* at 45. Based on these facts, the appellate court determined reversible error was shown. In doing so, the court placed emphasis on the fact that the juror's acquaintance was with the family of the victim and, additionally, that the juror served as foreman of the trial jury, "a position of influence."

In reaching its conclusion, the *Von January* court contrasted the facts before it with those before the court in *Babin v. State*, 149 Tex. Crim. 339, 194 S.W.2d 563 (1946). In *Babin*, which also involved the foreman of the trial jury, the juror also failed to disclose the degree of his relationship with the victim. Although he had said that he

"only knew him when he saw him [the deceased]," he failed to mention that he and the deceased were neighbors in a very small town. *Id.* at 566. The appellate court concluded the jury foreman's answer on voir dire "was not so palpably misleading or intentionally deceptive as to require reversal." *Von January*, 576 S.W.2d at 45.

The facts before us are more nearly akin to those in *Babin* than those in *Von January*. Here, the juror's relationship was with a minor witness, virtually all of whose testimony was echoed by other witnesses. Additionally, the variance between the nature of the juror's relationship and what was not revealed was minimal. The trial court did not abuse its discretion in refusing to grant the motion for new trial. Appellant's fourth point is overruled.

In her fifth point, appellant assigns error to the admission of testimony concerning her reputation for being law abiding while living in Moriarity, New Mexico, approximately three years before Stephanie's death. In support of this point appellant initially cites *Smith v. State*, 162 Tex.Crim. 237, 283 S.W.2d 936, 938-39 (1955), which defines general reputation as "what is generally said about him in the community in which he lives . . . ." Appellant acknowledges but seeks to distinguish *Arocha v. State*, 495 S.W.2d 957, 958 (Tex.Crim.App. 1973), which held "[a] person's community is not limited to the locale where the case is tried nor his residence at the date the offense was committed." Appellant's attempt to distinguish *Arocha* is unavailing.

In *Arocha*, the defendant was being prosecuted in Austin for the sale of marijuana. The witness was asked if had heard that Arocha was charged with possession of marijuana in Houston. The appellant argued the question was improper because it did not inquire as to his reputation

"in the community" and Houston could not be consider "in the community" of Austin. In overruling that contention, the court commented, "[A] person's community is not limited to the locale where the case is tried nor his residence at the date the offense was committed." *Arocha*, 495 S.W.2d at 958.

Although *Arocha* supports the trial court's decision here, article 37.07, § 3(a) of the Code of Criminal Procedure is dispositive of this point. This statute governs the type of evidence admissible at the punishment phase of trial. In relevant part, it provides:

> evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to . . .his general reputation, his character, [and] an opinion regarding his character . . . .

Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a) (Vernon Supp. 1996).

Nothing in the foregoing statute limits evidence of a defendant's general reputation to a particular community. *See also Tompkins v. State*, 774 S.W.2d 195, 216-17 (Tex.Crim.App. 1987), *aff'd*, 490 U.S. 754, 109 S.Ct. 2180, 104 L.Ed.2d 834 (1989) (holding defendant's reputation in Virginia admissible in Texas prosecution). Appellant's fifth point is overruled.

In his sixth point, appellant contests the trial court's refusal to submit a jury instruction on the offense of endangering a child. It is well established that upon timely request, a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. First, the lesser offense must be within the proof necessary to establish the offense charged. Second, the record must contain some

evidence that would permit a jury rationally to find that if the defendant is guilty, she is guilty of only the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex.Crim.App. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 313, 126 L.Ed.2d 260 (1993).

Examination of the elements of the Penal Code offenses of injury to a child (§22.04(a)) and endangering a child (§ 22.041(c)) suggests that endangering a child is a lesser-included offense of the second and third methods by which one may commit injury to a child (causing serious mental deficiency, impairment or injury or by causing bodily injury) but not of the first method (causing serious bodily injury). The most significant distinction between the two offenses is that endangering a child does not require an actual injury. Here, appellant was indicted for causing serious bodily injury and serious mental deficiency and impairment. The jury charge contained instructions on all three methods of committing injury to a child.

Having determined that endangering a child can be a lesser included offense of injury to a child, we must next determine whether there was some evidence that would have permitted a jury to rationally find that if appellant was guilty, she was guilty only of the lesser offense. In order to make such a finding, the jury would have to find that appellant failed to provide Stephanie with proper nutrition, but neither her bodily injury nor her death were the result of that malnutrition.

The only evidence that Stephanie's injury or death might have been caused by something other than malnutrition came from Dr. Nielsen, who also testified that Stephanie was *not* suffering from malnutrition. Consequently, the jury would have to disbelieve the State's experts who said Stephanie was malnourished, disbelieve the State's experts on

the issue of causation, and believe Dr. Nielsen's speculative theory of causation while rejecting her testimony concerning malnutrition. Given the nature of the evidence, which we have recited in rather exhaustive detail, we do not agree that the jury could rationally engage in such mental gymnastics. We overrule appellant's sixth point.

In her seventh point, appellant assigns error to the admission of the testimony of one of the State's expert witnesses, Dr. Pence. Appellant characterizes the testimony as presenting novel theories and opinion although she "lacked the expertise to make them admissible." The admission of expert testimony is governed by Rule 702 of the Texas Rules of Criminal Evidence. That rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The decision of whether to permit the testimony of an expert witness is within the discretion of the trial court, *Duckett v. State*, 797 S.W.2d 906, 910 (Tex.Crim.App. 1990), and will not be overturned absent an abuse of that discretion. *Amos v. State*, 819 S.W.2d 156, 163 (Tex.Crim.App. 1991), *cert. denied*, 504 U.S. 917, 112 S.Ct. 1959, 118 L.Ed.2d 561 (1992). The primary consideration is whether the expert's specialized knowledge will assist the trier of fact. *Pierce v. State* 777 S.W.2d 399, 414 (Tex.Crim.App. 1989), *cert. denied*, 496 U.S. 912, 110 S.Ct. 2603, 110 L.Ed.2d 283 (1990). Rule 702 is not satisfied when the witness's knowledge or expertise is unlikely to exceed the common knowledge or reasoning of the jurors. *Id*; *Alba v. State*, 905 S.W.2d 581, 592 (Tex.Crim.App. 1995).

Careful examination of appellant's argument in support of this point fails to reveal any reference to testimony presenting the "novel theories" she seeks to challenge. There are, however, specific references to testimony that appellant argues was beyond the expertise of Dr. Pence.

As recited above, Dr. Pence held a Ph.D and was an associate professor of pathology who studies and teaches nutrition. Appellant complains that Dr. Pence's statements that children who are not fed properly often have behavioral problems because they are constantly hungry, were improperly admitted because she was not a psychologist or medical doctor. We cannot agree. Logic would support the testimony of Dr. Pence that those engaged in the study of nutrition and the effects of malnutrition also study the effects of nutrition on behavior. Admission of this testimony was proper.

Appellant also complains of Dr. Pence's testimony that overfeeding a severely malnourished person can cause heart failure. Appellant asserts that admission of this testimony was improper because Dr. Pence was not a medical doctor or cardiologist. In response to defense questions on voir dire, Dr. Pence testified that the issue of heart failure was one of the topics she teaches to medical students. We are unprepared to hold that a person qualified to teach a topic to medical students is not qualified to give expert testimony on that same topic. Appellant's seventh point is overruled.

In her eighth and final point, appellant challenges the trial court's refusal to submit a requested instruction to the effect that if the jury found that appellant's culpable mental state was merely criminal negligence, they must acquit. Since the indictment only alleged an offense by omission, an

examination of the text of Section 22.04(a) shows this is indisputably an accurate statement of the law:

> A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child . . . serious bodily injury.

Tex. Penal Code § 22.04(a) (Vernon 1994).

However, it is established law that an instruction that merely denies an element of the offense need not be given. *Moore v. State*, 736 S.W.2d 682 (Tex.Crim.App. 1987). Because the State was required to prove that appellant acted intentionally, knowingly, or recklessly, the requested instruction that criminal negligence was insufficient simply sought to negate an element of the offense.

Appellant cites *Troyer v. State*, 516 S.W.2d 163, 164 (Tex.Crim.App. 1974), for the proposition that the failure to give a defensive charge on the issue of culpability is reversible error. In *Troyer*, the trial court failed to give *any* instruction on culpability in spite of a specific request. Here, however, the court's charge included instructions on intentionally, knowingly and recklessly, making *Troyer* inapplicable. *See Manuel v. State*, 782 S.W.2d 335, 337 (Tex.App.--Houston [1st Dist.] 1989, pet. ref'd). Appellant's eighth point is overruled.

In summary, all of appellant's points are overruled and, finding no reversible error in the proceeding below, we affirm appellant's conviction.

John T. Boyd
Justice

Do not publish.

APPENDIX G

FORM NUMBER 3

THE STATE OF TEXAS	IN THE 364TH DISTRICT COURT
VS. NO. 92-415353	OF LUBBOCK
STEVEN DANIEL CARMAN	COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY --
NO PROBATION GRANTED

Judge Presiding	: Bradley S. Underwood	Date of Judgment: 3/18/94
Attorney for State	: Travis S. Ware : Rececca Atchley	Attorney for Defendant: Sam Ogan
Offense Convicted of	: Injury to a Child, : a Lesser, but : Included Offense : of the offense : charged	Date Offense Comitted on or about: 06/8/92
Degree	: 3rd	
Charging Instrument:	Indictment	
Plea	: Not Guilty	
Jury Verdict	: Guilty	Foreman: Joe M. Woolley

072211

Plea to Enhancement Paragraph (s) : n/a	Enhancement Paragraphs (s):n/a
Findings of Use of Deadly Weapon : n/a	
Punishment Assessed by : Jury	
Date Sentence: Imposed : January 21,1994	Expenses incurred by County for Experts for for Defense: $13,151.64 Costs:$97.50
Punishment and Place of Confinement : 10 yrs. TDC	Date to: Commence: 01/21/94
Time Credited : 1 day	Total Amount of Restitution: $-0-
Concurrent Unless Otherwise Specified:	

On the 6th day of December, 1993, this cause was called for trial, and the State appeared by a duly appointed Criminal District Attorney, and the defendant appeared in person, in open Court, his counsel also being present;

And the said defendant having been duly arraigned in open Court, and having pleaded not guilty to the offense charged, both parties announced ready for trial; thereupon a jury of good and lawful persons were duly selected,

impaneled and sworn, who having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider their verdict, and afterward was brought into open Court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

"We, the jury, find from the evidence beyond a reasonable doubt the defendant is guilty of the offense of recklessly, by omission, causing serious bodily injury to a child fourteen (14) years of age or younger.

/s/ Joe M. Woolley
Foreman:

A finding of guilty having been returned by the jury and the defendant having requested that the punishment be assessed by the same jury and evidence having been offered by the State and the defendant as to the prior criminal record of the defendant including his general reputation and his character, and the Court having duly charged the jury, the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open Court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, having found the defendant, STEVEN DANIEL CARMAN, guilty of the offense of recklessly, by omission, causing serious bodily injury to a child fourteen (14) years of age or younger, assess his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of ten (10) years.

/s/ Joe M. Woolley
Foreman"

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of the offense of Injury to a Child, a lesser, but included offense of the offense charged, a Third-degree felony, committed on or about June 8, 1992 as found by the jury, and that he be punished by confinement in the State Penitentiary for a term of Ten (10) years and that the State of Texas do have and recover of the said defendant, all costs in this prosecution expended for which execution will issue, and further the State of Texas do have and recover of the said Defendant expenses incurred by Lubbock County for fees advanced to experts for the defendant, and said defendant is jointly and severally liable for said expert expenses with the co-defendant Patricia Carman, and that the said defendant be remanded to jail to await the further order of this Court herein;

It appearing to the Court that all other matters following the entry of such Judgment have been regularly disposed of; the court thereupon asked the defendant if he had anything to say why Sentence should not be pronounced against him, to which he answered, he had not, whereupon the Court in the presence of the said defendant and his counsel. pronounced sentence against the defendant as follows:

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant who had been adjudged to be guilty of the offense of Injury to a Child, a lesser, but included offense of the offense charged, a third-degree felony, committed on or about June 8, 1992, be delivered to the Sheriff of Lubbock County, Texas, who shall immediately convey him to the Texas Penitentiary, there to

be turned over to the Director of Corrections of the Department of Corrections of the State of Texas, or other person legally authorized to receive such convict, to be confined and imprisoned for a term of Ten (10) years, the punishment assessed in accordance with the provisions of the law governing the penitentiaries of said State, and the said defendant is remanded to jail until the said Sheriff can carry out the directions of this Sentence.

IT IS FURTHER ORDERED that the defendant is to receive credit for all applicable jail time as set out above, pursuant to Article 42.03, Texas Code of Criminal Procedure.

Notice of Appeal: _____

/s/ Bradley S. Underwood
PRESIDING JUDGE

March 18, 1994
DATE SIGNED

FILED
MAR 18 11 32 AM '94
Wayne McCray
District Lubbock Co.

Fingerprint from
right thumb
finger of Defendant
STEVEN DANIEL CARMAN
Cause No. 92-415353 364th
Date Sentence Imposed: _____

APPENDIX H

FORM NUMBER 3

THE STATE OF TEXAS		IN THE 364TH DISTRICT COURT
VS.	NO. 92-415352	OF LUBBOCK
PATRICIA CARMAN		COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OF JURY --
NO PROBATION GRANTED

Judge Presiding	: Bradley S. Underwood	Date of Judgment: 3/10/94
Attorney for State	: Travis S. Ware : Rebecca Atchley	Attorney for Defendant: Daniel Hurley
Offense Convicted of	: Injury to a Child	
Degree	: 1st	Date Offense Committed on or about 06/08/92
Charging Instrument:	Indictment	
Plea	: Not Guilty	
Jury Verdict	: Guilty	Foreman: Joe M. Woolley
Plea to Enhancement Paragraphs(s)	: n/a	Enhancement Paragraphs(s) :n/a

072121

Findings on Use of Deadly Weapon	: n/a	
Punishment Assessed by	: Jury	
Date		Expenses incurred by County for Experts for Defense: $13,151.64
Sentence Imposed	: 01/21/94	Costs:$97.50
Punishment and Place of Confinement	: 50 yrs. TDC	Date to: Commence: 01/21/94
Time Credited	: 1 day + 01/21/94 : to the present	Total Amount Restitution:$-0-
Concurrent Unless Otherwise Specified:		

On the 6th day of December, 1994, this cause was called for trial, and the State appeared by a duly appointed Criminal District Attorney, and the defendant appeared in person, in open Court, her counsel also being present;

And the said defendant having been duly arraigned in open Court, and having pleaded not guilty to the offense charged, both parties announced ready for trial; thereupon a jury of good and lawful persons were duly selected, impaneled and sworn, who having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged

by the Court, retired in charge of the proper officer to consider their verdict, and afterward was brought into open Court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

"We, the jury, find from the evidence beyond a reasonable doubt the defendant is guilty of the offense of intentionally or knowingly, by omission, causing serious bodily injury to a child fourteen (14) years of age or younger.

/s/ Joe M. Woolley
Foreman"

A finding of guilty having been returned by the jury and the defendant having requested that the punishment be assessed by the same jury and evidence having been offered by the State and the defendant as to the prior criminal record of the defendant including her general reputation and her character, and the Court having duly charged the jury, the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open Court by the proper officer, the defendant and her counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, having found the defendant, PATRICIA CARMAN, guilty of the offense of intentionally or knowingly, by omission, causing serious bodily injury to a child fourteen (14) years of age or younger, assess her punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of fifty (50) years.

/s/ Joe M. Woolley

Foreman:

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of the offense of Injury to a Child, a First-degree felony, committed on or about June 8, 1992 as found by the jury, and that she be punished by confinement in the State Penitentiary for a term of Fifty (50) years and that the State of Texas do have and recover of the said defendant, all costs in this prosecution expended for which execution will issue, and further the State of Texas do have and recover of said Defendant all expenses incurred by Lubbock County for fees advanced to experts for the defendant, and said defendant is jointly and severally liable for said expert expenses with the co-defendant Steven Daniel Carman, and that the said defendant be remanded to jail to await the further order of this Court herein;

It appearing to the Court that all other matters following the entry of such Judgment have been regularly disposed of; the court thereupon asked the defendant if she had anything to say why Sentence should not be pronounced against her, to which she answered, she had not, whereupon the Court in the presence of the said defendant and her counsel, pronounced sentence against the defendant as follows:

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant who had been adjudged to be guilty of the offense of Injury to a Child, a First-degree felony, committed on or about June 8, 1992, be delivered to the Sheriff of Lubbock County, Texas, who shall immediately convey her to the Texas Penitentiary, there to be turned over to the Director of Corrections of the Department of Corrections of the State of Texas, or other person legally authorized to receive such convict, to be confined and

imprisoned for a term of Fifty (50) years, the punishment assessed in accordance with the provisions of the law governing the penitentiaries of said State, and the said defendant is remanded to jail until the said Sheriff can carry out the directions of this Sentence.

IT IS FURTHER ORDERED that the defendant is to receive credit for all applicable jail time as set out above, pursuant to Article 42.03, Texas Code of Criminal Procedure.

Notice of Appeal: _____

/s/ Bradley S. Underwood
PRESIDING JUDGE

March 10, 1994
DATE SIGNED

FILED
MAR 11 4 07 PM '94
Wayne McCray
DISTRICT OF LUBBOCK CO.

Fingerprint from
right thumb
finger of Defendant
PATRICIA CARMAN
Cause No. 92-415352 364th
Date Sentence Imposed: _____

APPENDIX I

AMENDMENT VI.

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, an to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridges, except for participation in rebellion, or other crime, the basis of

representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member or any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts obligation and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.